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A

ACCOUNT STATED.
See PARTNERSHIP, 1.

ADMINISTRATION.

1. *Administration — Sale without order of court — Receipts, evidence touching.* — In suit brought against the sureties on the bond of an administratrix for failure to account for and pay over the assets of the trust estate, evidence showing the sale of the estate and amount of proceeds received would be competent, although it further appeared that the sale was without the order of court and unauthorized; and she should be charged with the amount so received. — State, to use of Peppler, Adm'r, v. Scholl, 84.

2. *Administrator — Bond — Act of January 12, 1869, not void because it failed to require bond, etc.* — The act of January 28, 1859, amendatory of that of February 9, 1857, authorizing William C. Boon, as administrator, to sell the estate of Watts, deceased, for the benefit of his heirs, did not require him to give a new bond; nor was it void because it failed to require his bond; nor was his authority to sell under the act unwarranted because it failed to show that the heirs were minors. It was not necessary that the act should show their disability. If the persons whose property was sold were in fact minors at the time of the sale, that fact made the authority complete. — Garnett v. Leonard, 205.

3. *Wills.* — A testator by will gave all his property to his wife, to manage and control for her benefit and that of their children, with power of sale, etc., and, at her death, to be divided among his children. On her death the administrator of testator took possession of her personal property, embracing household furniture, notes and accounts, claiming that they belonged to that estate, to be distributed according to the will. The administrator of the estate of the wife demanded the property, and proceeded against testator's administrator by attachment, under the statute (Wagn. Stat. 85, §§ 7-11). It appeared in evidence that, for many years after the death of her husband, the wife continued the business, and died in possession of an estate, treating it as her own, worth more than double that which was left her. *Held:* 1. That the property in charge of the wife, although a trust estate, as it terminated at her death, did not go to the administrator of the trustee, but went at once to the heirs of the testator. 2. That the household furniture was hers, whether she accepted or renounced the trust, and that the will should be held to apply only to the property subject to distribution. 3. That though the proper increase of the trust property was affected by the trust,

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yet the will being partly for her benefit, she was entitled to her proportionate share in the profits. 4. That, as the property belonging to the wife was so mixed with the other as not to be easily separated, the proceedings under the statute for concealing and embezzling property were not the proper ones for investigating the subject.—Hook, Adm'r of Dyer, v. Dyer, 214.

4. *Administrators, sureties on bond of, suits against—Consent of parties can not confer jurisdiction on Circuit Court.*—Suit against the sureties on an administrator's bond was instituted in the Circuit Court of Dade county, but, on motion of defendants, was removed to the Circuit Court of Cedar county, where plaintiff obtained judgment. *Held*, that the latter court had no jurisdiction of the subject-matter, and that the judgment was unauthorized. The exclusive jurisdiction given to the Probate Court of Dade county (Sess. Acts 1845, p. 70) in such suits, by implication prohibits all other courts from acting, the Circuit Court of Cedar as well as that of Dade. Parties in such a proceeding can not by consent confer jurisdiction upon Circuit Courts.—Dodson, Adm'r of Gray, v. Scroggs, Adm'r of Scott, 285.

5. *Administration—Practice, civil—Pleading, motion to make more definite.*—In suit on the bond of a defaulting administrator, by his successor in office, plaintiff should set up affirmatively the fact of his appointment as administrator, and the failure of such averment would be good ground for motion to make the petition more definite and certain; and it is usual and proper in such petition to give the date of his letters and the court from which they were issued. But it is sufficient to aver in general terms that the defendant was executor or administrator of the particular estate.—*Id.*

6. *Administration—Barton County Probate Court—Suit against administrators must be first brought in the Probate Court.*—Suit brought against an administrator in Barton county must, under the statute of March 19, 1866 (Sess. Acts 1866, p. 85, § 6), concerning Probate Courts, in the first instance be determined in the Probate Court. And parties can not by consent confer jurisdiction on the Circuit Court.

Section 23 of said act was not intended to preserve the provisions of the general law authorizing suits against estates in the Circuit Court. It is not inconsistent with, nor can it be held to repeal, section 26, but simply applies the provisions of existing laws to the new court.—Cones v. Ward, Adm'r, 289.

7. *Administrator, claim brought into court by, and allowed without appointment of any one to defend, substantially a filing of claim.*—An administrator, within a year after taking out his letters, presented to the probate judge a claim against the estate. Without appointing "a suitable person to appear and manage the defense," the probate judge passed upon it. Some four years afterward, the error in the allowance being discovered, the claim was again called up and rejected as being barred by the statute of limitations. *Held*, that although such proceeding, so far as the judgment was concerned, was clearly irregular and perhaps void, yet, inasmuch as it showed that the administrator acted in good faith, and that he brought his demand into court, it would be construed as amounting to an exhibition of the demand within two years, within the meaning of the statute (Wagn. Stat. 102, § 2), so as to prevent the barring of the claim by limitation.

Although, in a technical sense, the claim might not be considered as filed in the manner called for by section 24, p. 105, Wagn. Stat., it substantially and

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sufficiently met the requisitions of the law.—Williamson v. Anthony, Adm'r of Cooksey, 299.

8. *Administration — Suit by administrator — Set-off — Affidavit — Presumption.*— Proof of the existence of a debt, which might be used as a set-off to a demand sworn to against an estate, is not of itself sufficient evidence to show *prima facie* that the debt was actually so applied, especially when neither the minutes of the court nor the account presented show anything in relation to the set-off. Affidavit of the claimant that he has allowed all just credits and set-offs establishes no such presumption.—Sweet, Adm'r of Jones, v. Maupin, 323.

9. *Administration — Sales — Requirements of statute must be complied with.*— The statute (Wagn. Stat. 98, § 33) which requires that proceedings concerning administrators' sales of real estate shall be reported to the court at the next term of the court after such sale, must be strictly complied with, or the sale will be held irregular and void. (Speck v. Wohlien, 22 Mo. 310; Strouse v. Drennan, 41 Mo. 289, cited and affirmed.)—Mitchell v. Bliss, 353.

10. *Administration — Final settlement has the force of a judgment.*— An administrator's final settlement must bind the estate with the force of a judgment unless it can be impeached for fraud.—Picot, Adm'r of Dillon, v. Bates, 390.

11. *Courts, probate — Claims, allowance of — Judgment, impeachment of.*— Where a Probate Court disallowed a credit claimed by an administrator in his final settlement against an estate, for a payment which had been made by him in advance of any order of that court, and within a year from the grant of his letters, the order of disallowance will, on appeal to the Supreme Court, be sustained, notwithstanding that the Probate Court had allowed and classified the claim paid by him. It is true that an allowance and classification by the Probate Court is in effect a valid judgment, which can not be impeached collaterally. But the disallowance of the credit does not rest upon the theory of any error or wrong in the judgment of the Probate Court.—Dullard, Adm'r of Dullard, v. Hardy, Adm'r of Dullard, 403.

See WILLS.

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See EVIDENCE, 3, 4, 6, 7, 8, 10. PARTNERSHIP, 1.

AGED PERSONS.

See CONTRACTS.

AGENCY.

1. *Agency—Co-owners of boat — Private bargain for transportation of freight — Trust.*— One who was a part owner and general active and managing agent of a steamboat, made a contract in his own name for the transportation of certain freight at a specified price. The contract was not made with reference to its being performed by the steamer mentioned, which was not at that time in port; but the contractor made use of the boat for the transportation of the freight, without mentioning to his co-owners his private arrangement as to price of freightage. *Held,* that he occupied a relation of trust toward the co-owners, and that they had a right to presume that he would exercise the most entire good faith in his dealings toward them, and that in

AGENCY—(*Continued.*)

any business in which he employed the boat they were entitled to a proportionate share of the profits received and earned.—Rea v. Copelin, 76.

2. *Agency—Trustee not allowed to profit out of his trust—Application of rule.*—The rule that a trustee is not allowed to make a profit out of his trust is based on a principle of human nature that no person having a duty to perform shall be allowed to place himself in a situation in which his interest and his duty may conflict; and by a trustee, in this sense, is meant a person who acts representatively, or whose office is to advise and operate not for himself, but for others. This principle applies to and includes executors, administrators, guardians, attorneys at law, general and special agents, assignees, commissioners, sheriffs, and all persons, judicial or private, ministerial or counseling, who in any respect have a concern in the business intrusted to them.—*Id.*

3. *Agency—Bailment—Robbery—Ordinary care—Negligence.*—If money belonging to a bank is taken from its agent or collector by thieves or robbers when he is using ordinary care and is guilty of no negligence, he is clearly not liable.—Rechtscherd v. Accommodation Bank, 181.

4. *Agency—Agent must obey instructions of principal, whether reasonable or otherwise, except where.*—It is the clearly-established rule of law that an agent is bound to execute the orders of his principal whenever, for a valuable consideration, he has undertaken to perform them, whether reasonable or not, unless prevented by some unavoidable accident, without any default on his part, or unless the instructions require him to do an illegal or immoral act; and it is no defense that he intended to act for the benefit of his principal. He is still responsible for loss occasioned by any violation of his duties, either in exceeding or disregarding instructions.—*Id.*

5. *Bankrupt act of 1867—Agent—Commission merchant acts in a fiduciary capacity, within meaning of section 33.*—Under section 33 of the bankrupt act of 1867 (U. S. Stat. at Large, 533), an indebted factor or commission merchant stands in a fiduciary relation to his principals, with respect to the proceeds of sales of commission goods in his charge, and debts incurred in such capacity are not discharged under that act.—Lemcke v. Booth, 385.

6. *Agency—Principal, ratification of acts of agent by—Appropriation and disposal of property.*—Where an agent, without the authority of his principals, borrows money and invests it in property, the principals, by afterward appropriating and disposing of the property for their own benefit, will be held to ratify the act and become liable; and the measure of their liability is the amount of money borrowed, and not that realized by the sale.—Watson v. Bigelow, 413.

See INSURANCE, 11. PARTNERSHIP, 2.

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See JUDGMENTS, 1. PRACTICE, CIVIL—PLEADING, 2, 3.

ARBITRATION AND AWARD.

1. *Arbitrations—Awards, attestation of, at what time necessary.*—The non-attestation of an award at the time of promulgation (see Wagn. Stat. 143, § 6) does not necessarily vitiate the award. The attestation is a formality that may be supplied after suit on the matters arbitrated has been brought, and after motion to confirm the award had been refused. And *semble*, that no

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attestation at all is necessary for the purpose of suing on the award where the submission did not provide for a confirmation under the statute.—Tucker v. Allen, 488.

2. *Arbitrations regarded with favor by courts.*—The Missouri statute concerning arbitration was plainly designed to encourage the adjustment of differences between parties by arbitration by providing a summary mode of enforcing awards and of setting them aside where good cause could be shown for doing so.—*Id.*

3. *Arbitrations—Award—Waiver—Evidence showing waiver of oath is competent.*—A written submission to arbitration is a statutory one, and under the statute touching arbitrations (Wagn. Stat. 143, § 3) the arbitrators must be sworn before proceeding to hear testimony. But the parties to the arbitration may waive the taking of the oath, and evidence of circumstances showing such waiver is competent before a jury.—*Id.*

4. *Arbitrations and awards—What constitutes a valid award to be determined by the court.*—Where an award is offered in evidence it is for the court to determine what facts were requisite to constitute a valid award, and to declare the legal effect of the award when made.—*Id.*

ASSESSMENT.

See REVENUE.

ATTACHMENT.

1. *Attachment—Judgment on constructive notice, petition to set aside—Case must be in position to be heard within two years—Waiver of notice, what not.*—Under the statute (Gen. Stat. 1865, p. 569, § 60; Wagn. Stat. 193, § 60) a petition to set aside a judgment in attachment, rendered on constructive notice, must be filed in court, in a position to be heard, within two years from the date of the judgment. And the notice of such proceeding, under section 61 of the act, must be filed fifteen days before the expiration of the two years. The mere filing of the petition within two years, when the case can not be reached for trial within that period, is not sufficient. A proper construction of the statute makes no distinction between the time for an appearance and the time for making proofs. And the petition must be filed in court, and not with the clerk or judge during vacation.

In such a proceeding, the appearance of the counsel for the other party, and his agreement to submit the cause to the court, notwithstanding the disqualification of the judge holding it to sit in the cause, would be no waiver of the sufficiency of the notice, but simply a waiver of objection to the judge who was to pass upon the sufficiency of the notice.—Underwood v. Dollins, 259.

2. *Attachment—Bond—Seal, what sufficient.*—The word "seal," printed between brackets, in an attachment bond, and adopted by the parties as their seal or scroll, was a sufficient sealing of the instrument.—*Id.*

3. *Attachment—Replevin—Evidence in what, proper.*—Certain goods having been seized by a sheriff on attachment as the property of A., were replevied by B., whereupon the sheriff admitted the taking, and justified on the ground that the goods were the property of A., and were taken in virtue of the attachment. In the replevin suit it was proper for B. to show that A. made to him false representations as to his financial standing, as going to prove that the goods were procured fraudulently. It was not competent, however, for the

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sheriff to show that A. had pledged the goods sued for, while yet in his possession, as security to a third party for borrowed money. Such testimony was not germain to the issues involved.—Hartt v. McNeil, 526.

See MORTGAGES AND DEEDS OF TRUST, 7. PRACTICE, CIVIL—PLEADING, 1.

B

BANKS AND BANKING.

1. *Married women, deposits by—May be withdrawn by husband, when—Construction of statute.*—The statute concerning savings banks and fund companies (Gen. Stat. 1865, ch. 68, § 14; Wagn. Stat. 331–2, § 14) enables a married woman to deal with a bank without the intervention of her husband, in relation to deposits made by her; but it does not take from her husband his common-law right to reduce such fund to possession on his own checks.—Clark v. National Bank of State of Missouri, 17.

See EVIDENCE, 9. REVENUE, 11, 12.

BANKRUPTCY.

1. *Bankrupt act of 1867—Agent—Commission merchant acts in a fiduciary capacity, within meaning of section 33.*—Under section 33 of the bankrupt act of 1867 (U. S. Stat. at Large, 533), an indebted factor or commission merchant stands in a fiduciary relation to his principals, with respect to the proceeds of sales of commission goods in his charge, and debts incurred in such capacity are not discharged under that act.—Lemcke v. Booth, 385.

BARTON COUNTY.

See ADMINISTRATION, 6. LANDS AND LAND TITLES, 6.

BILLS AND NOTES.

1. *Bills and notes—Insurance company—Secretary, signature of—Authority.*—A draft signed by the secretary of an insurance company alone is not binding on the company where there was no evidence of any usage or law giving him authority to bind the company.—The First National Bank of Kansas City v. Hogan, 472.

See CONTRACTS, 7. PARTITION, 1. PRACTICE, CIVIL—PLEADING, 1.

BOATS AND VESSELS.

See AGENCY, 1.

BONDS.

See ATTACHMENTS, 2. CONTRACTS, 4, 5, 7. RAILROADS, 1.

BONDS, UNITED STATES.

See REVENUE, 11, 12.

BOUNDARIES.

See LANDS AND LAND TITLES, 9, 10, 11.

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CONSTITUTION OF MISSOURI.

1. *Constitution, State, does not prohibit amendments or repeals by implication—Construction of statute.*—The act of March 18, 1870, touching the assess-

CONSTITUTION OF MISSOURI—(*Continued.*)

ment and collection of revenue on real estate, by implication repeals such portions of the revenue act (Wagn. Stat. 128, particularly § 88, p. 1198) as are repugnant to and inconsistent with it. The State constitution (see art. IV, § 25) does not prohibit amendments by implication. It has not said that when an act is passed inconsistent with a preceding one, so that both can not stand, the latter one shall be void, and the earlier one shall prevail; but has left the law as it always has been, viz: that when two statutes are inconsistent and repugnant, the one last enacted shall be considered in force. But in order to supplant previous ones, statutes must be clearly repugnant; for a legislative attempt to repeal will not be assumed if any other construction can be given to the subsequent act. The prior act will not be disregarded if it can stand with the other.

The method provided by section 66, chapter 12, Gen. Stat. 1865, of delivering the tax book to the county auditor, who is to make out the tax bills and furnish them to the collector, is repugnant to the act of March 18, 1870, and must be controlled by it.—State ex rel. Maguire v. Draper, 29.

2. *Habeas corpus, constitutionality of law should not be tested by in the Supreme Court.*—Where one has been arrested and detained on legal process by a court having jurisdiction of the person and the offense, is in custody of the proper officer, and by virtue of a provision of the law, this court will not, on a writ of *habeas corpus*, inquire into the constitutionality of the law under which he was arrested. He should test the validity of that question by means of trial in the appropriate court.—In re Harris, 164.

See STATUTE, CONSTRUCTION OF.

CONTRACTS.

1. *Contracts—Care of aged persons—Contract for, contemplates what.*—In the execution of contracts to take care of aged persons, great patience with their infirmities is required. Such an agreement contemplates not only food, medicine and clothing, but good temper, forbearance, and an honest effort to please.—Gupton v. Gupton, 37.

2. *Contracts—Agreement to dispose of property by will—Parol contracts—Statute of frauds.*—An agreement to dispose of property by will in a particular way, if made on sufficient consideration, is valid and binding; and partial performance of a verbal contract of this description will take it out of the operation of the statute, when refusal to complete it would work a fraud on the other party.—*Id.*

3. *Contracts—Bill for specific performance, when proper.*—When the vendor of land by contract conveys the property contracted to be sold to a third person, in such a manner that the land can not be reached, the court will not entertain a petition in equity for a specific performance merely for the purpose of compensating the purchaser in damages, but will leave him to his action on the agreement. Some ground for equitable interference will be required, as when the contract is by parol and can not be enforced at law, but may be by proceedings in equity; or where the vendor has conveyed all his property, and a judgment for damages merely would be altogether useless. —*Id.*

4. *Bonds—Breaches—What insufficient assignment of.*—The condition of a bond was that the obligor should use his endeavors to sell certain lands before

CONTRACTS—(*Continued.*)

a given date. A petition on the bond, which stated that plaintiff did not know and could not say whether defendant did use his endeavors to sell and dispose of the property before the day mentioned, but that defendant did not sell and dispose of the property within the time specified, did not sufficiently assign the breaches of the bond.—Schuyler v. Chittenden's Ex'x, 65.

5. *Apprentice—Action by an indenture—Bar of statute deemed waived, when.*—In an action by an apprentice upon an indenture given his master, brought more than two years after plaintiff became of age, defendant, if he fails to avail himself of the bar of the statute (Wagn. Stat. 137, § 17), either by demurrer or answer, will be held to have waived its benefits.—Boyce v. Christy, 70.

6. *Bonds, penal—Action on separate breaches—General judgment erroneous.*—Where an action on an indenture given to an apprentice counts independently on various breaches, and their investigation involves separate and independent inquiries and findings, they should be held to be independent causes of action, although arising out of the same contract. A general verdict given in such a suit is erroneous, and judgment thereon may be arrested. Each count calls for a separate judgment, and the common-law rule of pleading can not apply under our statute (statute touching penal bonds, Wagn. Stat. 239).—*Id.*

7. *Bonds—Contracts—Purchase money of land—Obligations on note and bond mutually dependent, when.*—When a bond is conditioned to convey land upon the payment of a note given for the purchase money, the vendor should tender a deed thereof if he seeks to recover on the note. The obligations on the bond and on the note are mutually dependent.—Dietrich v. Franz, 85.

8. *Contracts—Constitution—Act of 1859, vacating offices in the University of the State of Missouri, did not impair the obligation of a contract.*—In a suit against the University of the State of Missouri, for salary claimed to be due plaintiff, it appeared that he had been elected to fill an office made vacant by the act of 1855 (R. C. 1855, p. 1502, § 24), for a term of six years, "subject to law;" that by the act of December 17, 1859 (Sess. Acts 1859–60, p. 91), all the offices of professors, tutors, and teachers connected with the university, including his own, had been declared vacant. *Held*, that the act was not unconstitutional as impairing the obligation of a contract.

The university was a public and not a private corporation. There were no grantees named in the act creating it (Sess. Acts 1838–9, p. 176), and consequently no parties either to accept or reject the grant. Under it the State entered into no compact with private parties; the private contributions given to secure its location did not make the contributors founders of the university; nor did the contributions alter the character of the institution.

Being elected, plaintiff did not hold his office by virtue of a contract with the university. He was an officer, and not an employee, of the institution.

Being elected "subject to law," he was subject both to existing laws and such laws as the Legislature might thereafter enact.—Head v. Curators University of Missouri, 220.

9. *Contract—Consideration—Promise given in consideration of a sale—Statute of frauds.*—A. being indebted to B. for the purchase of goods, sold them to C., who, in consideration of the sale from A. to himself, promised A. to pay his debt to B. *Held*, that the sale was a good consideration for the

CONTRACTS—(*Continued.*)

promise; that B. might sue C. upon it in his own name, and that the promise need not be in writing.—Flanagan v. Hutchinson, 237.

10. *Contract — Ambiguity — Usage not proper evidence to explain written contract, when.*—No usage, however general and well understood, can be permitted to control the terms of a special contract, where its subject-matter and terms are clear of doubt and obscurity.

Evidence of usage comes in to show the intention of the parties in all those particulars which are not expressed in the contract, or which are expressed in unusual or technical terms.—Kimball v. Brawner, 398.

11. *Practice, civil — Pleadings — Parol and written contracts, when sued on, must be distinctly stated.*—Parties may, by a subsequent parol agreement, upon a sufficient consideration, change or modify the terms of their written contract. But in suits on contracts of this nature the contracts must be distinctly set forth. Thus, where in a suit to recover insurance money for goods lost by fire, the petition set forth an absolute independent agreement, disconnected with any other previous transaction, it would not be competent for the plaintiff, in that state of pleadings, at the trial, to graft a verbal on a prior written contract.—Henning v. United States Ins. Co., 425.

12. *Corporations — Insurance companies — Parol contracts can not be made when charter or by-laws call for written agreements.*—Corporations, when they are not restrained in any particular manner by their charters, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers. And there are adjudicated cases showing that at common law, where no particular mode of insurance is pointed out in the charter, insurance companies may make verbal contracts of insurance which are binding and valid. But where a company's charter declares that "all conditions of policies issued by said company shall be printed or written on the face thereof," and its by-laws require that the president "shall sign all policies or other contracts by which the company shall be bound," and "that every proposal for insurance shall be by written application, signed by the applicant or his agent," such company can make no original or binding contract by parol.—*Id.*

See AGENCY, 1, 2. BILLS AND NOTES, 1. COURTS, COUNTY, 3. DAMAGES, 3. FRAUDS, STATUTE OF, 2, 3. INSURANCE, FIRE AND MARINE. INSURANCE, LIFE. PARTNERSHIP, 3. PRACTICE, CIVIL — PLEADING, 8, 9. RAILROADS, 1

CONVEYANCES.

1. *Conveyances — Life estate — Mortgage — Conditional estate — Reverter — Forfeiture.*—A deed from A. to B. conveyed a life estate in certain premises, remainder in fee to the children of A.; and provided that in case of the attempt of B. to sell or dispose of his interest or life estate, except to the children, that estate should cease and the property vest absolutely in the children. B. afterward conveyed away the property by mortgage. *Held*, first, that the mortgage, either in itself or as perfected by subsequent action, was a sale such as worked a forfeiture of the life estate; second, that such estate was not one upon condition, with a reversion to the grantor upon condition broken, as the entire estate passed out of him with no possibility of reverter; that hence no declaration of forfeiture on the part of the grantor was necessary to determine the estate of the grantee, but that his life estate terminated, and that of

CONVEYANCES—(*Continued.*)

the children commenced, at once upon the making of the mortgage.—Gilker v. Brown, 105.

2. *Deeds—Delivery a question of law where there is no dispute as to the facts.*—Where the facts touching the delivery of a deed are undisputed, their legal effect is simply a question of law, upon which the court may be required to pass.—Rogers v. Carey, 232.

3. *Conveyances—Sheriff's sale, purchase at—Delivery to purchaser against will of original grantee.*—The grantees in a deed containing a false description took possession thereunder, and their interest in it was sold on execution. A delivery afterward to the purchaser of a correct deed would not be a constructive delivery to the grantees, so as thereby to pass the legal title through them to the purchaser, when they refused to receive the instrument. There could be no delivery to the grantees without their express or presumed consent.—*Id.*

4. *Conveyance, suit to reform—Evidence required.*—In a suit to reform a deed, if the mistake be denied by defendant, very positive evidence would be required to establish it; but where the mistake is admitted, a preponderance may be sufficient to show what was intended to be inserted in the place of the erroneous matter.—Bunse v. Agee, 270.

5. *Conveyances—Record—Consideration—Notice.*—As against the first grantee of an unrecorded deed of land, a record of his own conveyance by a subsequent purchaser from the first grantor will avail nothing, provided he purchase with notice of the original unrecorded conveyance, or his purchase is not made on payment of a good and valuable consideration.

The actual notice required by the statute is used in contradistinction to the constructive notice given by a record. It does not mean that there must necessarily be direct and positive evidence that the subsequent purchaser actually knew of the existence of the deed. Any proper evidence tending to show it—facts and circumstances coming to his knowledge that would put a man of ordinary circumspection on his inquiry—should go to the jury as evidence of such notice. Proof of actual knowledge of the existence of the former deed has never been held to be necessary, but the jury have the right to infer such knowledge from facts that would naturally suggest it, and from which the actual relation of the prior purchaser to the land might be reasonably inferred.—Maupin v. Emmons, 304.

6. *Sheriff's deed, recitals in.*—The recitals in a sheriff's deed are conclusive on the parties to the deed and those claiming under them.—Durette v. Briggs, 356.

See EQUITY, 11. FRAUDULENT CONVEYANCES. LANDS AND LAND TITLES, 12. MORTGAGES AND DEEDS OF TRUST. WILLS, 6.

CORPORATIONS.

1. *Revenue—Corporations, stock of, what liable to assessment.*—Not only the original stock, but all after-acquired capital stock of a corporation in private hands, is liable to assessment under the revenue act of 1864 (Sess. Acts 1863–4, p. 65).—St. Louis Mutual Life Ins. Co. v. Charles, 462.

2. *Revenue—Corporation—Capital stock—Shares of stock—Judgment against collector for taxes irregularly assessed, effect of.*—The statute makes a distinction between the liability to taxation of the property of a cor-

CORPORATIONS—(*Continued.*)

poration embraced within its capital stock and of the shares of such stock, but the result is or should be the same. In either case, if the officers of the corporation pay the tax, they pay it for the shareholders; and if judgment is rendered against the collector for the amount of taxes collected by him from a corporation, the result of the judgment will be to collect of defendant, for the use of the shareholders, a sum of money in effect paid for them and which they were under obligation to pay.—*Id.*

See BILLS AND NOTES, 1. INSURANCE, FIRE AND MARINE. INSURANCE, LIFE. JURISDICTION, 1. LIMITATIONS, 3. PRACTICE, CIVIL—PLEADING, 10, 11. RAILROADS.

CORPORATIONS—MUNICIPAL.

See REVENUE 4, 6, 7. ST. LOUIS, CITY OF.

COSTS IN CIVIL CASES.

1. *Practice, civil—Costs—Superfluous costs may be retaxed and money refunded by the clerk, when.*—Where superfluous and unnecessary matter is inserted in a transcript by the clerk, costs may be retaxed, and the clerk may be compelled to refund costs taxed for such superfluous matter.—Smith v. Myers, 342.

COUNTY TREASURER.

See ELECTIONS, 1, 2, 3.

COURTS, CIRCUIT.

See ADMINISTRATION, 4, 6. COURTS, COUNTY, 1.

COURTS, COUNTY.

1. *County Courts—Claims against counties—Res adjudicata—Appeal to Circuit Court.*—A County Court, in auditing claims against the county, is simply its financial agent, and not a judicial body. And it has never been held that the disallowance of a claim by a county operates as a judgment. The fact that an appeal lies from its action to the Circuit Court is no indication that such action is a judgment. This is but a statutory mode of bringing the county into the Circuit Court without original process, and the claimant may avail himself of it or commence suit.—Reppy v. Jefferson County, 66.
2. *County Court, order of—Order-book, entry in—Best evidence, when.*—An order of the County Court for the payment of money is properly entered on its order-book, and that entry is the best evidence of its action, and, until impeached for fraud or mistake, must determine its obligation.—*Id.*
3. *Courts, county, contracts with—Indexing, etc.*—Although, in making a contract for indexing the land record of a county, the County Court may expressly refer to a price named in a statute and make it govern the price fixed for the work agreed on, yet a price for services, referred to in a contract for indexing of lands as being such as is allowed for such services by law, is not thereby properly fixed, as no statute defines the price for those services. The fee allowed recorders for indexing deeds is no criterion in determining the value of services of this description.—*Id.*

COURT OF CRIMINAL CORRECTION.

See INSURANCE, 11.

COURTS, DISTRICT.

See PRACTICE, CIVIL—APPEALS, 1, 2.

COURT, ST. LOUIS CIRCUIT.

1. *Practice, civil — Act of March 4, 1869, does not authorize General Term to reverse merely on weight of evidence.* — The object of the fourteenth section of the act organizing the Circuit Court of St. Louis county in General Term, as amended by the act of March 4, 1869 (Sess. Acts 1869, p. 18, § 2), was not in any manner to change or enlarge the scope or powers of the court at General Term as they previously existed, but to provide for appeals in cases where it was apprehended that final judgment had not been rendered. But it does not authorize the General Term to reverse merely on weight of evidence.— McKay et al. v. Underwood, 185.

CRIMES AND PUNISHMENTS.

1. *Indictments — Misdemeanors — Selling liquor on Sunday.* — There is no statutory provision now authorizing indictments for the offense of selling liquor on Sunday. The misdemeanor act of March 27, 1868 (Sess. Acts 1868, p. 81), by implication repealed section 30, chapter 207, Gen. Stat. 1865; and the act (Sess. Acts 1869, p. 69) repealing that of March 27, 1868, did not in terms restore said section, and can not do so by implication. (Wagn. Stat. 894, § 3.)

But the offense is a statutory misdemeanor created by section 35, page 504, Wagn. Stat., and made subject to a fine not exceeding fifty dollars. Hence, under section 29, page 516, Wagn. Stat., the fine is recoverable in a civil action; and this particular method of proceeding being pointed out, must be pursued, and a common-law indictment will not lie.—State v. Huffschmidt, 73.

2. *Practice, criminal — Indictment, allegations in — Repugnancy.*—An indictment charged defendant with forging a check "purporting to be the act of M. E. Susisky, treasurer of the city of St. Louis." The check afterward set out showed the signature of "M. E. Susisky, treasurer." *Held*, that the two allegations were not inconsistent with and repugnant to each other. (State v. Finley, 18 Mo. 445.) — State v. Kroeger, 552.

3. *Criminal law — St. Louis city treasurer — Blank check, filling out and using for a different purpose than that directed, constitutes forgery.* — The treasurer of the city of St. Louis left with A. certain blank checks, with directions to fill them up to the use of holders of warrants against the city; but A. took one of the checks, inserted the date and amount, and the words "cash or bearer" in place of the words "order of," erased from the printed blank. By whom the words were erased did not appear. A. converted the check to his own private use, by depositing it in bank the same day on his private account, and drawing the money on it for his own use. *Held*, that under the statute law of this State (Wagn. Stat. 470, § 16) he was guilty of forgery in the third degree. As the check had been signed with specific instructions to use it for a certain purpose, A., in thus filling it up for a different purpose, clearly made a false instrument.— *Id.*

See CRIMINAL LAW. INSURANCE, 11. PRACTICE, CRIMINAL.

CRIMINAL LAW.

1. *Criminal law — Escape of prisoner before term expires — Second offense.*— A prisoner who, before the expiration of his term, escapes and commits another crime, may be convicted and sentenced therefor, although at the time still under sentence for his first offense; and his period of imprisonment for the second one will commence on the expiration of the first term.— Ex parte Brunding, 255.

CRIMINAL LAW—(*Continued.*)

2. *Criminal law — Misdemeanor — Constable, extortion by — Construction of statute.* — It belongs solely to the justice of the peace to determine the compensation to be allowed his constable for receiving and keeping property levied on. And until that question is determined by the justice, the exaction of any money from the debtor by the constable for such services is extortion and a misdemeanor within the meaning of the statute (Wagn. Stat. 488, § 19). — State v. Vasel, 416.

See PRACTICE, CRIMINAL.

D

DAMAGES.

1. *Damages, exemplary — Trespass, in action of, when granted.* — Exemplary or punitory damages are recoverable in an action of trespass against the person, where injury was wantonly inflicted; and in such a suit the injured party may give in evidence such facts and circumstances accompanying the wrong as may have occasioned him special inconvenience and suffering.— Green v. Craig, 90.
2. *Corporations — Railroad companies — Damages to stock — Want of fences and cattle-crossings — Pleadings — Allegations, what necessary.* — In a suit against a railroad company for damages to stock, the petition, framed under the statute concerning railroad companies (Wagn. Stat. 310, § 43), averred that the injury occurred at a point where defendant's road passed through uninclosed prairie lands; that these lands were not fenced, nor the proper cattle-guards erected. But there was no averment or evidence that the animal strayed on the road through defect of cattle-guards or in consequence of the absence of fences, either at the locality of the injury or elsewhere. *Held*, that under such a state of the pleadings and evidence plaintiff would not be entitled to recover. To render the company liable it must appear that the animal injured entered on the road, in consequence of the absence of fences or cattle-guards, at a point on the line of the road which the company was bound to secure in that manner.— Cecil v. Pacific R.R. Co , 246.
3. *Damages, measure of — Contracts not completed by reason of the default or unwarranted acts of the other party — Quantum meruit, etc.*—Where the contractor is prevented from completing his job by the unwarranted acts and defaults of the other party, he may either sue upon the contract and claim damages for a breach of it, or he may waive the contract and sue for the reasonable value of his work. He is not restricted to a *pro rata* share of the contract price.— McCollough v. Baker, 401.
4. *Damages — Negligence, contributory.* — One person will not be allowed to impute a want of vigilance to another injured by his act, as negligence, if that very want of vigilance were the consequence of an omission of duty on his part.— Morrissey v. Wiggins Ferry Co., 521.
5. *Damages — Railroad companies — Negligence — Servant — Skill — Liability of company.* — A servant who has been injured by the negligence, misfeasance or misconduct of a fellow-servant, can maintain an action therefor against the master, where the servant, by whose negligence or misconduct the injury was occasioned, was not possessed of ordinary skill or capacity in the business intrusted to him, and the employment of such incompetent servant was

DAMAGES—(*Continued.*)

attributable to the want of ordinary care on the part of the master.—Harper v. Indianapolis & St. Louis R.R. Co., 567.

6. *Railroad company, action against for damages—Fireman, incompetent—Permission by engineer to act in his place—Liability of company.*—In suit against a railroad company for injuries done to plaintiff, if it appear that the company was negligent or unmindful of its duty in employing competent and skillful servants in the execution of its business, and that injury resulted therefrom to a fellow-servant, it must be held responsible; and of the sufficiency of the proof to sustain this fact, the jury are the proper judges. And permission given by the company to an engineer to allow a fireman to act as an engineer, when he deemed the fireman competent, makes the company responsible for injuries resulting from a mistake or negligence of the engineer in permitting a fireman to handle the engine when incompetent for duty.—*Id.*

See AGENCY, 6. INJUNCTION, 3. INSURANCE, 1. JURISDICTION, 1. MORTGAGES AND DEEDS OF TRUST, 2. PRACTICE, CIVIL—TRIALS, 5.

DEPOSITIONS.

See EVIDENCE.

DESCENTS AND DISTRIBUTIONS.

See WILLS, 8, 9.

DESCRIPTION.

See LANDS AND LAND TITLES, 5. SALES, 1.

DIVORCE.

See HUSBAND AND WIFE, 3.

DOWER.

1. *Dower, statute touching—Appointment and continuance of commissioners.*—Under the statute relating to dower (Wagn. Stat. 544, § 29), when the first report made by the commissioners for its admeasurement was rejected, and one of the commissioners failed or refused to act, the court might properly appoint another in his stead, and continue the other two in office, for the purpose of again assigning dower, without a re-appointment.—Lenox v. Livingston, 256.

2. *Dower, commissioners appointed to determine—Action of, can not be interfered with, when.*—The commissioners appointed for the admeasurement of dower are the proper persons to determine as to what portion of the land of the deceased should be assigned, and, in the absence of testimony showing that they abused their discretion, their action can not be interfered with.—*Id.*

See HUSBAND AND WIFE, 4, 5. LANDS AND LAND TITLES, 13.

E

ELECTIONS.

1. *Elections—County treasurer, appointed in January, 1871, entitled to office as against one elected in November.*—A. was elected county treasurer of St. Louis county in November, 1870. B. was appointed treasurer in January, 1871. In *quo warranto* to test the title of A. to the office, *held*, that the election in November was illegal and void; that notwithstanding that election, the office was vacant on January 5, 1871, and that B. was properly appointed to fill the vacancy.

ELECTIONS—(*Continued.*)

The clause of the act of March 3, 1857, fixing on the first Monday of August, 1858, and every six years thereafter, as the time for the election, was, in its designation of the day of the week for the election, in conflict with section 2, article II, of the present State constitution, and was therefore, so far forth, repealed; but the constitution did not affect the six years provided for the treasurer's term of office. And the Legislature was authorized to alter the law as to the day of the week, and fix on the Tuesday following the first Monday in August as that for the election. (Sess. Acts 1865–6, p. 88.) Hence the day for election was properly in August, and not in November.—State ex rel. Attorney-General v. Fiala, 310.

2. *Elections — County treasurer — Act of March 19, 1866, a general and not special law relative to the time of holding county, town and city elections.*— The act of March 19, 1866 (Sess. Acts 1865–6, p. 88), is not void as being in conflict with that part of section 27, article IV, of the State constitution which prohibits special legislation. Nor was it unconstitutional as reviving a special law. The act of March 3, 1857, was never revived by it.—*Id.*

3. *County treasurer — Elections — Act of March, 1857, not repealed by section 1, chapter 38, Gen. Stat. 1865, or by act of March 22, 1870.*— The act of March 3, 1857, was not repealed either by section 1, chapter 38, Gen. Stat. 1865, or the act of March 22, 1870 (Sess. Acts 1870, § 35). Neither of the last-named enactments had any reference to the local act of 1857. The object of that of March 22, 1870, was to amend the general law in relation to county treasurers (Gen. Stat. 1865, ch. 38, § 1). But, even supposing that the act of March, 1870, had been enacted as a new law throughout, and that its provisions were in conflict with the prior local act, it did not have the effect of repealing it by implication, as nothing indicates an intention on the part of the Legislature to do away with the local act. Section 2 of the act of March, 1870, in terms repealing all acts and parts of acts in conflict with it, refers only to general, inconsistent laws. It was no part of the purpose of the act to touch the question of elections or the term of office. — *Id.*

EJECTMENT.

1. *Ejectment — Judiciary act — Magwire v. Tyler — What points properly decided by Supreme Court.* — Under section 25 of the judiciary act, the Supreme Court of the United States is confined to questions arising under laws of the United States, and can not consider any distinct equity arising out of contracts or transactions between parties. And the only thing which that court could decide in the case of Magwire v. Tyler was the validity of the respective confirmations to Brazeau and Labeaume.

Under the decision of the Supreme Court in that case (8 Wall. 650) the legal title vested in plaintiff, and under that ruling his proper remedy was ejectment. But suit was brought by bill in equity, and should be dismissed. —Magwire v. Tyler, 115.

2. *Equity — Ejectment — Bill to set aside deed and vacate title can not be united with suit for possession.*— In a bill to set aside a deed as fraudulent, the plaintiff can not sue for the recovery of the possession of the land; and proceedings instituted for the purpose of vacating title, vesting it in plaintiff, and to eject defendant and obtain possession, are fatally erroneous on writ of error or appeal, and can not be sustained. When the decree is entered establishing plaintiff's title, he must then pursue his remedy in ejectment for the

EJECTMENT—(*Continued.*)
possession. The defendant has a right to have a jury to pass upon the question of rents and profits and upon other questions which may arise in that form of action.—*Id.*

See LANDS AND LAND TITLES, 4. MORTGAGES AND DEEDS OF TRUST, 4.

EQUITY.

1. *Contracts — Bill for specific performance, when proper.*—When the vendor of land by contract conveys the property contracted to be sold to a third person, in such a manner that the land can not be reached, the court will not entertain a petition in equity for a specific performance merely for the purpose of compensating the purchaser in damages, but will leave him to his action on the agreement. Some ground for equitable interference will be required, as when the contract is by parol and can not be enforced at law, but may be by proceedings in equity; or where the vendor has conveyed all his property, and a judgment for damages merely would be altogether useless. —Gupton v. Gupton, 87.
2. *Equity — Election, general principle of.*— The general principle of election is frequently applied by courts of equity in cases of wills, and rests upon the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both.—Graham v. Roseburgh, 111.
3. *Equity—Specific performance—Election.*—A testator made a devise of "the residue" of his estate, in trust for the use and benefit of his heirs, among whom was A. Afterward the testator agreed to convey to A. a certain tract in Shelby county, which tract A. proceeded to possess and improve. On testator's death, the trustees paid over to A. his portion of the uses and profits derived from the "residue." In suit against the trustees for specific performance of testator's contract to convey, *held*, that A. would not be compelled to elect between the rents and profits of his share in the residue and the land in controversy. The disposal of the Shelby land during the lifetime of the testator took it out of the residuary clause, and showed that he had no intention to include that property in the devise.—*Id.*
4. *Ejectment — Judiciary act — Magwire v. Tyler — What points properly decided by the Supreme Court.*—Under section 25 of the judiciary act, the Supreme Court of the United States is confined to questions arising under laws of the United States, and can not consider any distinct equity arising out of contracts or transactions between parties. And the only thing which that court could decide in the case of Magwire v. Tyler was the validity of the respective confirmations to Brazeau and Labeaume.

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5. *Equity — Ejectment — Bill to set aside deed and vacate title can not be united with suit for possession.*— In a bill to set aside a deed as fraudulent, the plaintiff can not sue for the recovery of the possession of the land; and proceedings instituted for the purpose of vacating title, vesting it in plaintiff, and to eject defendant and obtain possession, are fatally erroneous on writ of error or appeal, and can not be sustained. When the decree is entered estab-

EQUITY—(*Continued.*)

lishing plaintiff's title, he must then pursue his remedy in ejectment for the possession. The defendant has a right to have a jury to pass upon the question of rents and profits and upon other questions which may arise in that form of action.—*Id.*

6. *Equity—Statute changes only form of action—Court will not interfere in an action strictly equitable.*—Although, under the statute (Wagn. Stat. 999, § 1), legal and equitable cases are to a certain degree blended as to form, the principles remain the same, and the court will not interfere and exert its equity powers in a strictly legal action. The innovation extends only to the form of action in the pleadings. The party need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trover, trespass, or ejectment, without regard to ancient forms; but the distinction between the actions remains the same.

To entitle plaintiff to an equitable interference of the court, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate and complete relief at law.—*Id.*

7. *Practice, civil—Issues in equity may be framed by the chancellor—Where not abused, the power will not be interfered with.*—It is permissible for a chancellor, in his sound discretion, to frame issues and take the opinion of a jury for his guidance; and when this power is not abused or wrongfully exercised it will not be interfered with. (Wagn. Stat. 1041, § 13.)—Looker v. Davis, 140.

8. *Conveyance, suit to reform—Evidence required.*—In a suit to reform a deed, if the mistake be denied by defendant, very positive evidence would be required to establish it; but where the mistake is admitted, a preponderance may be sufficient to show what was intended to be inserted in the place of the erroneous matter.—Bunse v. Agee, 270.

9. *Practice, civil—Equitable offset—Mortgage—Surety—Injunction, etc.*—In a suit on a note or account, an answer alleging that plaintiff is insolvent, and that defendant is liable, as plaintiff's surety, upon an over-due promissory note to a third party; that a suit had been commenced to foreclose a mortgage given by plaintiff to secure the note, and that the mortgaged property, in the opinion of defendant, will prove insufficient to pay the note in full, discloses no existing claim in favor of the defendant against the plaintiff, either legal or equitable, nor does it show any ground for enjoining the suit.—Hopkins v. Fechter, 331.

10. *Practice, civil—Chancery, issues in, opinion of the jury may be taken touching, etc.*—In the progress of a chancery proceeding the chancellor has the undoubted right to take the opinion of the jury on one or all of the issues arising in the cause. He may adopt their conclusion, but is not bound by it.—Hickey v. Drake, 369.

11. *Equity—Vendee of land, mistake by, good ground for setting aside the contract, when.*—A mistake on the part of the vendee, when he makes a contract for the purchase of land, relying on the false representations of the vendor, is good ground for rescinding it.—*Id.*

12. *Equity—Action to divest title—Agreement, when of the essence of a contract—Payment stipulated in cases affecting minors—What sufficient compliance with stipulation.*—In suit by a lessee against the heirs of his lessor, to divest title out of defendants and vest it in plaintiff, it appeared that

EQUITY—(*Continued.*)

by the terms of an agreement between the parties plaintiff was to have the privilege of purchasing the fee simple at any time within five years, but was required, if he elected to purchase, to give thirty days' notice of his intention to purchase, and to make payment of one-fourth. *Held:*

1. That notice given two days before the expiration of the five years was too late.

2. That defendants being minors, it was sufficient for plaintiff to aver his readiness to make the payment called for and to pay the money into court, subject to its order.

3. That the thirty days' notice was of the essence of the contract. The offer to sell within five years was simply a proposition without mutuality between the parties. For that reason time was of the essence of the agreement, and the acceptance must have been in accordance with the offer.

4. It was immaterial that defendants, being minors, were unable to convey. The notice was not a demand for a deed, but a stipulated act that would so obligate the defendants that the court, as the guardian of the rights of infants, would order a conveyance.—Mason, Trustee of Mason, v. Payne, 517.

13. *Equity—Decree need not embrace facts found.*—Under the present code it is not required that the facts upon which a decree is based shall be specifically found. In equity the case is now preserved in the same manner as in an action at law, by a bill of exceptions.—Judge v. Booge, 544.

See INJUNCTION. LANDS AND LAND TITLES, 12. REVENUE, 16.

ERECTIONS.

See LANDS AND LAND TITLES, 8.

EVIDENCE.

1. *Contracts, written—Parol testimony touching, when varying, improper.*—Parol testimony having a tendency to vary and impair written stipulations should be excluded.—Murdock v. Ganahl, 135.

2. *Conveyances, fraudulent—Evidence—Res gestæ—Sheriff's deed—Allegata and probata—Variance.*—A. bargained certain premises to B., who took A.'s bond for a deed and went into possession. Afterward B. sold out to C. a large amount of merchandise, being his whole stock in trade, and shortly afterward, at the time of consummating the bargain, also quit-claimed to him the premises. Subsequently the creditors of B. levied on the premises and sold them under execution. The purchaser at the sheriff's sale brought suit against C. to set aside B.'s quit-claim as fraudulent, and to vest title in plaintiff. *Held:*

1. That testimony touching the sale of the merchandise was admissible as part of the *res gestæ*.

2. That although the petition set out the judgment and execution under which the sale was made as being against B., whereas the deed described them as against B. and two others, there was not sufficient variance between the deed and the description of it in the petition to prevent its being read in evidence.

3. That A. had no interest in the suit, and the omission of him as a party was no ground for arresting the judgment.—Erfort v. Consalus, 208.

3. *Evidence—Dying declarations, when admissible in civil actions as part of the res gestæ.*—The doctrine permitting dying declarations, as such, to be given in evidence, applies exclusively to criminal prosecutions for

EVIDENCE—(*Continued.*)

felonious homicides, and has no reference to civil cases. But in suits of the latter description, declarations of dying persons are sometimes admitted on a different principle. Thus, such a declaration in regard to the cause of death growing directly out of, and made immediately after the happening of, the fatal event, would be admissible as constituting a part of the *res gestæ*. —Brownell v. Pacific R.R. Co., 239.

4. *Evidence — Sale, testimony of vendor touching, after, inadmissible, when.* —Admissions made by a grantor in a deed, or an assignor in an assignment, after making the deed or assignment, are not competent evidence against the grantee or assignee. However, when a common purpose is shown in the assignor and assignee to defraud the creditors of the assignee, the rule is different.

But declarations of a vendor, not made until some time after the vendee had taken possession of the goods under the sale, and at a time when the vendor had no control over them, would be inadmissible. At that time he would have no such interest in the goods as would entitle him to make any declarations or admissions that could affect the rights of the vendee.—Weinrich v. Porter, 293.

5. *Depositions — Certificate to, what sufficient.*—The certificate to a deposition stating that the witness was sworn to testify in the cause, that the deposition was reduced to writing and subscribed by him in the presence of the officer, on the day and between the hours (naming them) mentioned in the notice, is a sufficient compliance with the statute (Wagn. Stat. 526, § 22).—Thomas v. Wheeler, 363.

6. *Evidence — Admissions of one in possession of property, explanatory of his possession, when proper.*— The declarations or admissions made by one while in possession of property, explanatory of his possession — as that he holds it in his own right, or as a tenant or trustee of another — are admissible in evidence because they explain the character of the possession, and also as a part of the *res gestæ*.— *Id.*

7. *Insurance companies, fire — Admissions by officers, effect of.*—A corporation acts through its officers, and the admissions of such officers, made in the execution of the duties imposed upon them and concerning a matter upon which they are called upon to act, and which matter is within the scope of the authority usually exercised by them, are evidence against the corporation.— Northrup v. Mississippi Valley Ins. Co., 535.

8. *Insurance, fire — Declarations of president — Res gestæ.*—In suit on a fire insurance policy the declaration of the president, at a time when claims for the losses were presented to him for settlement, that he would pay if other companies would, was evidence against the company as a part of the *res gestæ*. — *Id.*

9. *Practice, civil — Pleadings — Answer — New matter must be set forth in pleadings.*—Under the old system of pleading the general issue, everything was open to proof which went to show a valid defense; but under the present practice act (Wagn. Stat. 1015, § 12), if defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute, in ordinary and concise language; otherwise he will be precluded from giving evidence of it at the trial.— *Id.*

EVIDENCE—(*Continued.*)

10. *Evidence — Admissions of principal, in suit against principal and sureties.* —Admissions made by a defaulting bank teller to the president, when the default was first discovered, were competent evidence against him and his sureties, because they formed a part of the *res gestæ*, and were made by him while acting in the course of his official duty. But it would not be in his power afterward to make admissions to the detriment of his sureties. Where, however, suit was against himself and his sureties combined, such admissions would be evidence against himself, and the court should be asked to instruct the jury that such evidence should be disregarded so far as the sureties were concerned.—Union Savings Association v. Edwards, 445.

11. *Evidence — Parish registers of another State not competent evidence unless shown to be authorized by laws of that State — Statute law must be proved like any other fact.*—A parish registry, showing the date of a child's baptism, is not competent evidence of his birth or his identity. Nor is it competent as evidence at all unless it appears in proof that such registry is required to be kept by the laws of the State from which it is taken; and the statute of another State on this point must be proved like any other fact. No presumption can arise in reference to such statutes, nor will courts take judicial notice of them. In the absence of all proof the courts of this State will presume that the general principles of common law prevail in other States.—Morrissey v. Wiggins Ferry Co., 521.

12. *Attachment — Replevin — Evidence in, what proper.*—Certain goods having been seized by a sheriff on an attachment as the property of A., were replevied by B., whereupon the sheriff admitted the taking, and justified on the ground that the goods were the property of A., and were taken in virtue of the attachment. In the replevin suit it was proper for B. to show that A. made to him false representations as to his financial standing, as going to prove that the goods were procured fraudulently. It was not competent, however, for the sheriff to show that A. had pledged the goods sued for, while yet in his possession, as security to a third party for borrowed money. Such testimony was not germain to the issues involved.—Hartt v. McNeil, 526.

13. *Evidence — Witness, impeachment of, on irrelevant matter.* — A witness is not to be interrogated on a subject not pertinent to the issues involved, for the mere purpose of discrediting him.—Harper v. Indianapolis & St. Louis R.R. Co., 567.

See CONTRACTS, 10. COURTS, ST. LOUIS CIRCUIT, 1. HABEAS CORPUS, 2. HUSBAND AND WIFE, 11. PARTNERSHIP, 1. PRACTICE, CIVIL — APPEAL, 8. PRACTICE, CRIMINAL, 14. WITNESSES.

EXECUTIONS.

1. *Act of March 13, 1867 — Construction of statute — Revenue — Special tax bills — Execution — Transcript.* — The act of March 13, 1867 (Sess. Acts 1867, p. 79, art. XI), repealing that of March 19, 1866 (Sess. Acts 1865-6, p. 79), does not authorize the enforcement of the judgment of a justice of the peace upon a special tax bill, on filing of a transcript of the judgment, by the issue of an execution thereon by the circuit clerk.—Moran v. January, 166.

2. *Executions, additional authorization in — Venditioni exponas — Act March 3, 1863.*—Where an execution in the form of an ordinary *venditioni exponas* was issued, reciting former levies and ordering the sale of what had been levied on, but leaving out entirely the command to levy on additional property,

EXECUTIONS—(*Continued.*)

as required by the act of March 3, 1863 (Sess. Acts 1863, p. 20, § 1), sale thereunder of additional property not before levied on would convey no title. The omission in the execution of the authorization to make additional levies would, in such case, not be held to be a clerical mistake, but a neglect by the party in interest to sue out the double writ to which he was entitled.—Maupin v. Emmons, 304.

3. *Executions—Sales under satisfied executions—Evidence, parol, touching.*—When it appears that certain of the premises levied on were sold by virtue of one or more executions after such executions were satisfied by the sale of other property, the deed as to such premises so subsequently sold is void and inoperative; and the question whether the premises were sold under executions which had thus performed their office was one to be decided either by the recitals of the sheriff's deed or by evidence *aliunde*.—Durette v. Briggs, 356.

See INJUNCTIONS, 2.

F

FIXTURES.

See LANDS AND LAND TITLES, 8.

FORCIBLE ENTRY AND DETAINER.

1. *Forcible entry and detainer, question of right does not arise in.*—In actions of forcible entry and detainer the question of right does not arise.—Van Eman v. Walker, 169.

FORGERY.

See CRIMES AND PUNISHMENTS, 2, 3.

FRAUD.

See ADMINISTRATION, 10. FRAUDS, STATUTE OF. FRAUDULENT CONVEYANCES.

FRAUDS, STATUTE OF.

1. *Contracts—Agreement to dispose of property by will—Parol contracts—Statute of frauds.*—An agreement to dispose of property by will in a particular way, if made on sufficient consideration, is valid and binding; and partial performance of a verbal contract of this description will take it out of the operation of the statute, when refusal to complete it would work a fraud on the other party.—Gupton v. Gupton, 37.

2. *Frauds, statute of—Undertaking to pay the debt of another, not made with creditor.*—The provision that no action shall be brought to charge any person upon the promise to answer for the debt of another, unless it is made in writing, is construed to apply to promises made to the creditor; and hence it is always held that while the creditor can not recover upon a collateral parol agreement made with him to pay his debtor's obligations, yet if such agreement be not made with the creditor it can be enforced if otherwise good, though not evidenced by any note or memorandum in writing.—Brown v. Brown, 130.

3. *Frauds, statute of—Undertaking to pay another's debt, made with debtor.*—An agreement to pay and discharge a debt, made with the debtor or some person interested for him, if founded upon a new and valid consideration, is an independent undertaking, and does not come within the letter or spirit of the statute.—*Id.*

FRAUDS, STATUTE OF—(*Continued.*)

4. *Contract — Consideration — Promise given in consideration of a sale — Statute of frauds.*—A. being indebted to B. for the purchase of goods, sold them to C., who, in consideration of the sale from A. to himself, promised A. to pay his debt to B. *Held*, that the sale was a good consideration for the promise; that B. might sue C. upon it in his own name, and that the promise need not be in writing.—Flanagan v. Hutchinson, 287.

See LANDS AND LAND TITLES, 9. PARTNERSHIP, 3.

FRAUDULENT CONVEYANCES.

1. *Conveyances, fraudulent — Evidence — Res gestæ — Sheriff's deed — Allegata and probata — Variance.*—A. bargained certain premises to B., who took A.'s bond for a deed and went into possession. Afterward B. sold out to C. a large amount of merchandise, being his whole stock in trade, and shortly afterward, at the time of consummating the bargain, also quit-claimed to him the premises. Subsequently the creditors of B. levied on the premises and sold them under execution. The purchaser at the sheriff's sale brought suit against C. to set aside B.'s quit-claim as fraudulent, and to vest title in plaintiff. *Held:*

1. That testimony touching the sale of the merchandise was admissible as part of the *res gestæ*.

2. That although the petition set out the judgment and execution under which the sale was made as being against B., whereas the deed described them as against B. and two others, there was not sufficient variance betweeen the deed and the description of it in the petition to prevent its being read in evidence.

3. That A. had no interest in the suit, and the omission of him as a party was no ground for arresting the judgment.—Erfort v. Consalus, 208.

2. *Evidence — Sale, testimony of vendor touching, after, inadmissible, when.*——Admissions made by a grantor in a deed, or an assignor in an assignment, after making the deed or assignment, are not competent evidence against the grantee or assignee. However, when a common purpose is shown in the assignor and assignee to defraud the creditors of the assignee, the rule is different.

But declarations of a vendor, not made until some time after the vendee had taken possession of the goods under the sale, and at a time when the vendor had no control over them, would be inadmissible. At that time he would have no such interest in the goods as would entitle him to make any declarations or admissions that could affect the rights of the vendee.—Weinrich v. Porter, 293.

H

HABEAS CORPUS.

1. *Habeas corpus, constitutionality of law should not be tested by, in the Supreme Court.*—Where one has been arrested and detained on legal process by a court having jurisdiction of the person and the offense, is in custody of the proper officer, and by virtue of a provision of the law, this court will not, on a writ of *habeas corpus*, inquire into the constitutionality of the law under which he was arrested. He should test the validity of that question by means of trial in the appropriate court.—In re Harris, 164.

HABEAS CORPUS—(*Continued.*)

2. *Habeas corpus — Indictments — Evidence — Parol testimony.* — In *habeas corpus* to obtain the discharge of a prisoner convicted on two or more indictments, after the expiration of the first term of imprisonment, where the records showed that he was sentenced on the different indictments the same day, it will be presumed that the respective sentences were uttered at the same point of time; and it was incompetent to show, by parol testimony, that sentence in one case preceded the trial in the others by "some hours," unless, from the peculiar circumstances of the case, justice seemed to demand it.—Ex parte Kayser, 253.

HANNIBAL, CITY OF.

See REVENUE, 4.

HOMICIDE.

See PRACTICE, CRIMINAL, 14, 15.

HUSBAND AND WIFE.

1. *Married women, deposits by — May be withdrawn by husband, when — Construction of statute.* — The statute concerning savings banks and fund companies (Gen. Stat. 1865, ch. 68, § 14; Wagn. Stat. 331-2, § 14) enables a married woman to deal with a bank without the intervention of her husband, in relation to deposits made by her; but it does not take from her husband his common-law right to reduce such fund to possession on his own checks. —Clark v. National Bank of State of Missouri, 17.

2. *Married women, statute concerning does not prevent husband from collecting in wife's personal chattels.* — Section 14, chapter 115, Gen. Stat. 1865 (Wagn. Stat. 935-6, § 14), concerning married women, simply deprives the husband of his power to convey away his interest in the real estate of his wife, and its rents, issues, and profits, without her consent and co-operation. But it does not restrain him from collecting in and reducing to possession her personal chattels and choses in action.— *Id.*

3. *Husband and wife — Legislative divorce supposed to be invalid — Power of wife to dispose of her separate property.* — By an act of the Missouri Legislature, a husband and wife were declared divorced, and for a period of twenty years afterward lived apart and ceased to intermeddle with the affairs of each other. Both married again and brought up children born of such marriages, built up separate and distinct property, and transacted their business without regard to any previous connection between them. *Held,* that under such circumstances, even admitting the divorce to be illegal, the law did not require the wife, after her second marriage, when she wished to dispose of her separate property, to prevail on her former husband to join in the conveyance, while he professed at the same time to be the husband of another woman. The length of time which elapsed after the divorce, and the manner in which each party regarded and treated the other, operated as an estoppel, and precluded them from interfering with the affairs of one another.—Richeson v. Simmons, 20.

4. *Married woman can provide for husband's debts by release of dower.* — It is competent for a married woman, with his consent, to provide for her husband's debts by release of her dower in his estate.—Brown v. Brown, 130.

5. *Married woman — Release of dower — Former release.*—A release of dower is not rendered valueless by the fact that the wife had previously released

HUSBAND AND WIFE—(*Continued.*)

her dower in a deed of trust given to secure a debt which had been paid without sale.—*Id.*

6. *Wills.*—A testator by will gave all his property to his wife, to manage and control for her benefit and that of their children, with power of sale, etc., and, at her death, to be divided among his children. On her death the administrator of testator took possession of her personal property, embracing household furniture, notes and accounts, claiming that they belonged to the estate, to be distributed according to the will. The administrator of the estate of the wife demanded the property, and proceeded against testator's administrator by attachment, under the statute (Wagn. Stat. 85, §§ 7–11). It appeared in evidence that, for many years after the death of her husband, the wife continued the business, and died in possession of an estate, treating it as her own, worth more than double that which was left her. *Held:* 1. That the property in charge of the wife, although a trust estate, as it terminated at her death, did not go to the administrator of the trustee, but went at once to the heirs of the testator. 2. That the household furniture was hers, whether she accepted or renounced the trust, and that the will should be held to apply only to the property subject to distribution. 3. That though the proper increase of the trust property was affected by the trust, yet the will being partly for her benefit, she was entitled to her proportionate share in the profits. 4. That, as the property belonging to the wife was so mixed with the other as not to be easily separated, the proceedings under the statute for concealing and embezzling property were not the proper ones for investigating the subject.—Hook, Adm'r of Dyer, v. Dyer, 214.

7. *Husband and wife—Separate property—Issues and products of real estate of wife.*—Where a married woman bought a farm and a quantity of personal property, partly on cash and partly on credit, and subsequently paid the notes given for the remainder due on the personalty out of the products of the farm: *held*, that such manner of payment of the personalty did not make it products of the real estate of the wife, so as to exempt it under the statute (Wagn. Stat. 935, § 14) from liability for the husband's debts.—Fisk v. Wright, 351.

8. *Insurance, life—Policy of, under statute, can not be assigned.*—A policy of insurance effected by the husband on his own life for the benefit of his wife and children, where the amount of premium actually paid was more than $300, may be assigned so as to bar the wife from recovering the proceeds of the policy in case of her survivorship. (See Wagn. Stat. 936, §§ 15, 18.) But *semble*, that under section 15 *supra*, such assignment would be void, even though she join her husband therein, where the annual amount of the premium was less than $300.—Charter Oak Life Ins. Co. v. Brant, 419.

9. *Insurance, life—Insurance by husband for benefit of wife—Statute an enabling act.*—At common law the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child merely in the character of husband or parent. But the statute (Wagn. Stat. 936, §§ 15, 18) is an enabling act. It enables the husband to effect a policy of insurance on his own life for the benefit of his wife, which, in case she survives him, goes to her free from his creditors and representatives. It also makes it lawful for a married woman, for her own benefit, to effect an insurance on the life of her husband, which shall belong to her and her children.—*Id.*

HUSBAND AND WIFE—(*Continued.*)

10. *Insurance—Married women, act touching—Insurance for benefit of—Right of wife to alienate such insurance.*—Under the law touching insurance for the benefit of married women (Wagn. Stat. 938, § 18), the wife has power to retain and appropriate insurance procured by her husband for her benefit if she sees fit, discharged from all claims of either her husband or his creditors. But it was not the intention of the Legislature in this act to impose on her any disability or restraint from alienation, where her act was free and voluntary. —Baker v. Young, 453.

11. *Married women, actions to charge separate property of—Insolvency of husband may be shown in evidence.*—In an action to charge the separate estate of a married woman for goods sold her, the insolvency of the husband may be proved in order to show, first, to whom credit was given, and second, whether the goods were necessaries adapted to the condition of the wife.—Miller v. Brown, 504.

12. *Married women, actions to charge separate property of—Intent to charge separate estate will be presumed, when.*—In suit to charge the separate property of a married woman for goods sold her, it appeared that she was introduced to plaintiff as a woman of wealth, and, before the debt sued on was contracted, had purchased several bills in her own name, which were always paid on presentation. The bill in suit she promised to pay at different times. Her own testimony showed that she did not intend to charge her separate estate, but did intend to charge her husband; that what she bought were necessaries adapted to her condition in life; but she admitted that she bought them in her own name, saying nothing about her husband. *Held*, that as she made the contract for herself, in her own name and on her own credit, the law will presume that she intended to charge her separate estate, notwithstanding her testimony to a contrary intent.

1. Under such circumstances, as against her property, it was immaterial whether the goods furnished were necessaries which the husband ought to have supplied.

2. In such suit against the husband, the proper amount of money to be expended by her for necessaries was to be determined by his condition in life, and not hers.

3. It was immaterial whether her debt was evidenced by a written instrument or not. Under the decision in Whitesides v. Cannon, the difference between the written and parol promise of a married woman is necessarily ignored. Yet there is this distinction touching the burden of proof: where goods designed for personal or family consumption are sold to the wife on her parol promise of payment, she will be presumed to purchase on the credit of her husband, while purchases made on her written agreement will be presumed to have been made on her separate credit.—*Id.*

See MECHANICS' LIENS, 4. MORTGAGES AND DEEDS OF TRUST, 4.

I

INDICTMENTS

See PRACTICE, CRIMINAL.

INJUNCTION.

1. *Injunction—Remedy resorted to, when.*—Where perfect remedy exists at law, resort should not be had to injunction.—Hopkins v. Lovell, 102.

INJUNCTION—(*Continued.*)

2. *Injunction — Execution sales — Cloud on title.* — Injunction will not lie to stay execution sales simply on the ground that they will pass no title and may cast a cloud on the title of the true owner.— Kuhn v. McNeil, 389.

3. *Injunction, assessment of damages on dissolution of — City of St. Louis, counsel for.* — The damages to be assessed upon the dissolution of an injunction (Wagn. Stat. 1030, § 13) are what the defendant has actually suffered. And in the assessment of damages on the dissolution of an injunction against the city of St. Louis, it appearing that the city counselor received no special fee for defending the injunction suit, *held*, that a fee for such defense could not be taxed as damages.— Uhrig v. The City of St. Louis, 528

See REVENUE, 16.

INSANITY.

See OFFICERS, 2.

INSURANCE, FIRE AND MARINE.

1. *Insurance companies, actions against — Vexatious delay, proof of — Jury — Verdict.* — In actions against insurance companies, under chapter 90, section 1, Gen. Stat. 1865, direct and explicit proof that the delay or refusal of payment was vexatious, is not required, but the jury must form their conclusions from all the facts and circumstances of the case.— Lockwood v. Atlantic Mutual Ins. Co., 50.

2. *Insurance — Freight list — Total loss — Profits — Measure of damages.* — On an open policy of insurance the insurable interest in freight to be transported is not the net amount after deducting expenses, but the gross amount to be received according to the bills of lading or charter-party. And in an action on such a policy to recover the insurance money on a freight list, where the boat was a total loss, the estimated expense of carrying the goods from the place of loss to the point to which the goods were shipped should not be deducted from the amount claimed. It is immaterial what further expenses would have accrued, what would have been the profits, or whether any, or what amount the assured would have received for freight if the voyage had not been broken up. The valuation on the freight fixes the liability of the company.— *Id.*

3. *Insurance, fire — Policy — Certificate of loss, sworn to by agent, when sufficient.* — It is the undoubted duty of one insured by a fire insurance company to furnish a sworn certificate of loss, where required to by the terms of the policy; and the performance of such a duty is a condition precedent to his recovery. And although ordinarily it would be a fatal objection to the certificate that it was sworn to by the agent, and not by the insured, yet proof and certificate made by an agent with whom the company had all their dealings, who was in sole possession of the property insured, and who alone knew the facts necessary to be embodied in the paper — who, in fact, was, as it were, insured as agent — is a compliance with the policy.

Even were a certificate so sworn to bad, the defect would be held to be waived where the company received the certificate, made no objection to it on that account till the case came on for trial, and long after the thirty days within which the certificate was to be furnished had expired, and, when payment was refused, placed the refusal on other grounds.— Sims v. State Ins. Co. of Hannibal, 54.

INSURANCE, FIRE AND MARINE—(*Continued.*)

4. *Insurance, fire — Premium note — Forfeiture for non-payment at maturity, how treated.*—While the law does not forbid, it certainly will not favor, but will rather lean against, forfeiture of a fire insurance policy for want of promptness in paying a premium note.— *Id.*

5. *Insurance, fire — Premium note — Non-payment — Forfeiture — Acceptance of proposal — Waiver.*— On the third day after the maturity of a premium note given on a fire insurance policy, the maker, not knowing how much would be actually due the company, wrote them a letter proposing to pay, and asking for a statement of the amount. The company at once applied upon the note the amount in their hands, and directed him to remit the balance, which he did by the first mail. *Held*, that the acceptance by the company of his proposal to pay was a complete waiver of the forfeiture arising from the non-payment of the note at maturity, and that they were liable on the policy when the property was burned after such acceptance, although before the remittance was forwarded.— *Id.*

6. *Insurance, fire — Misrepresentation — Warranty, breach of — Business of insured — Incidents of, supposed to be known to insurer.* — In suit on a fire insurance policy, where it appeared that the insured, in his application for insurance, stated that the purpose for which the building to be insured was used was "tobacco-pressing; no manufacturing;" and that, in fact, he used an addition to the main building for manufacturing hogsheads for the tobacco, the representation would not necessarily be such a concealment of the uses of the building as to constitute a breach of warranty which would vitiate the policy. Officers of an insurance company are supposed to know all the incidents of the business of the insured, and if there is any branch of it considered extra-hazardous, and which they are unwilling to cover by their contract, it should be specially provided against. Whether the preparation of the hogsheads was such an incident to the business as to be included in it, was a question of fact, and, if fairly presented to the jury, need not be reconsidered in this court.

In such suit the jury should be instructed to determine whether it is so generally customary for those engaged in the business of tobacco-pressing to prepare their own hogsheads, and in the building where the business is conducted, that such a preparation can properly be called an incident to the business.— *Id.*

7. *Insurance companies — New charter treated as amendment to old one, prior to change of constitution, when.*—The Hope Mutual Insurance Company was incorporated in 1857. In 1864 a new charter was obtained, which did not purport in terms to be an amendment to the old one, but had precisely the same title and embodied most of its provisions, with the addition of certain new ones. *Held*, that, under the present State constitution, it could not be treated as an amendment, both from defect of title and from want of proper specifications in regard to the act repealed. But under the constitution in force at the passage of the new charter, if, from the general scope of the act, it was evidently intended as such amendment or supplement, courts must so treat it.— Hope Mutual Ins. Co. v. Beckman, 93.

8. *Insurance companies, mutual, suit on premium note by — Amendment of charter, acceptance of by company.*— In general, the directors of a moneyed corporation, when the Legislature has parted with control over the charter,

INSURANCE, FIRE AND MARINE—(*Continued.*)

have no power to procure or validate by consent such changes in the charter as require the assent of the corporation. But in a suit by a mutual insurance company, after a change in its charter, against one of its former stockholders, on a premium note given prior to the change, no burden is thrown upon the company, as a part of its case, to show a due acceptance of the amendment by the corporation itself. The assent to the new charter by the corporation will be inferred from any acts or omissions inconsistent with any other hypothesis.—*Id.*

9. *Insurance—Certificate of assessment filed before justice as statement of cause of action, effect of.*—In a suit by an insurance company against a stockholder on his premium note, commenced before a justice of the peace, the filing by plaintiff of the certificate of assessment upon defendant's policy instead of his premium note, was not a fatal irregularity, but one which might be corrected whenever objection was raised to it, and would not vitiate a judgment if the trial were suffered to progress without raising it.—*Id.*

10. *Revenue—Foreign insurance companies—Ordinance compelling payment of $200 invalid—Construction of statute.*—Agents of foreign insurance companies are not liable to payment of $200 for license, as called for by the city ordinance of St. Louis, approved June 29, 1869. Subdivision 45 of section 1, article IV, of the city charter, passed in 1867 (Sess. Acts 1867, p. 45), authorizing the license, by ordinance not inconsistent with the laws of the State, of "all insurance companies, banking corporations and banking associations," did not repeal section 6, page 780, Wagn. Stat., compelling agents of foreign insurance companies to pay an annual tax of $100 to the city collector, but left that section in full force. There was nothing irreconcilable between the general affirmative power as to licensing, contained in the city charter, and the especial clause embodied in the statute. Hence the ordinance of June 29, 1869, was unauthorized and void.—City of St. Louis v. Independent Ins. Co. of Massachusetts, 146.

11. *Insurance, foreign—Agent—Proceedings against—Information—Court of Criminal Correction.*—One acting as agent and receiving premiums in St. Louis county, on behalf of a foreign insurance company which was not authorized by the superintendent of the insurance department to do business in this State, contrary to section 42 of the act concerning insurance other than life (Wagn. Stat. 777), may be proceeded against under section 30, p. 516, Wagner's Statutes. Notwithstanding that the statute which creates the offense provides for a different remedy (Wagn. Stat. 777, § 43), there is no inconsistency between the two statutes. But the proceeding in such case must be by information in the Court of Criminal Correction, and not by indictment.

As to all the rest of the State besides St. Louis county, the misdemeanor act of March 27, 1868 (Sess. Acts 1868, p. 81), repealed by implication section 30 *supra*, and was not restored by the repealing act of February 24, 1869 (Sess. Acts 1869, p. 69). (See State v. Huffschmidt, *ante*, p. 73.)—State v. Stewart, 382.

12. *Practice, civil—Pleadings—Parol and written contracts, when sued on, must be distinctly stated.*—Parties may, by a subsequent parol agreement, upon a sufficient consideration, change or modify the terms of their written contract. But in suits on contracts of this nature the contracts must be dis-

INSURANCE, FIRE AND MARINE—(*Continued.*)

tinctly set forth. Thus, where in a suit to recover insurance money for goods lost by fire, the petition set forth an absolute independent agreement, disconnected with any other previous transaction, it would not be competent for the plaintiff, in that state of pleadings, at the trial, to graft a verbal on a prior written contract.—Henning v. United States Ins. Co., 425.

13. *Corporations—Insurance companies—Parol contracts can not be made when charter or by-laws call for written agreements.*—Corporations, when they are not restrained in any particular manner by their charters, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers. And there are adjudicated cases showing that at common law, where no particular mode of insurance is pointed out in the charter, insurance companies may make verbal contracts of insurance which are binding and valid. But where a company's charter declares that "all conditions of policies issued by said company shall be printed or written on the face thereof," and its by-laws require that the president "shall sign all policies or other contracts by which the company shall be bound," and "that every proposal for insurance shall be by written application, signed by the applicant or his agent," such company can make no original or binding contract by parol.—*Id.*

14. *Insurance companies, fire—Indorsements by secretary and president, effect of.*—The acting secretary of an insurance company indorsed on a policy issued on certain property which had been sold to A. prior to the expiration of the policy, "Loss, if any, payable to A." The president further indorsed: "This policy is hereby changed to cover chairs and benches, instead of the museum collection, which is removed." *Held*, that the indorsements constituted valid contracts of insurance, and that the company was liable thereon.—Northrup v. Mississippi Valley Ins. Co., 435.

15. *Insurance companies, fire—Admissions by officers, effect of.*—A corporation acts through its officers, and the admissions of such officers, made in the execution of the duties imposed upon them and concerning a matter upon which they are called upon to act, and which matter is within the scope of the authority usually exercised by them, are evidence against the corporation.—*Id.*

16. *Insurance, fire—Declarations of president—Res gestæ.*—In suit on a fire insurance policy the declaration of the president, at a time when claims for the losses were presented to him for settlement, that he would pay if other companies would, was evidence against the company as a part of the *res gestæ*.—*Id.*

See BILLS AND NOTES, 1. PRACTICE, CIVIL—PLEADING, 10. REVENUE, 5, 6, 7, 8.

INSURANCE, LIFE.

1. *Forfeitures not favored.*—Forfeitures, if legally established, must be enforced, but are not favored.—Froelich v. Atlas Life Ins. Co., 406.

2. *Insurance companies—Premium notes, forfeiture of for non-payment waived by subsequent receipt of money.*—The forfeiture of an insurance policy for non-payment of the premium note will be waived by subsequent receipt, without objections, of the money by the company.—*Id.*

3. *Insurance, life—Policy of, under statute, can not be assigned.*—A policy of insurance effected by the husband on his own life for the benefit of his wife

INSURANCE, LIFE—(*Continued.*)

and children, where the amount of premium actually paid was more than $300, may be assigned so as to bar the wife from recovering the proceeds of the policy in case of her survivorship. (See Wagn. Stat. 936, §§ 15, 18.) But *semble*, that under section 15 *supra*, such assignment would be void, even though she join her husband therein, where the annual amount of the premium was less than $300.—Charter Oak Life Ins. Co. v. Brant, 419.

4. *Insurance, life—Insurance by husband for benefit of wife—Statute an enabling act.*—At common law the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child merely in the character of husband or parent. But the statute (Wagn. Stat. 936, §§ 15, 18) is an enabling act. It enables the husband to effect a policy of insurance on his own life for the benefit of his wife, which, in case she survives him, goes to her free from his creditors and representatives. It also makes it lawful for a married woman, for her own benefit, to effect an insurance on the life of her husband, which shall belong to her and her children.—*Id.*

5. *Insurance—Married women, act touching—Insurance for benefit of—Right of wife to alienate such insurance.*—Under the law touching insurance for the benefit of married women (Wagn. Stat. 938, § 18), the wife has power to retain and appropriate insurance procured by her husband for her benefit if she sees fit, discharged from all claims of either her husband or his creditors. But it was not the intention of the Legislature in this act to impose on her any disability or restraint from alienation, where her act was free and voluntary.—Baker v. Young, 453.

J

JUDGMENTS.

1. *Practice, civil—Judgment—Amendment of in General Term, when proper.*—When a verdict is based on conflicting testimony, a portion of which is improperly permitted to go to the jury to influence their determination, the only relief competent for the General Term to administer is to reverse the judgment of the court below and remand the case for a new trial. But where plaintiff, on the face of the papers, is entitled to the judgment awarded by the General Term, and the defense insisted on is a total failure, it would be warranted in proceeding to enter up such judgment as ought to have been rendered at Special Term. (See Sess. Acts 1869, p. 18, § 2.)—Murdock v. Ganahl, 135.

2. *Judgment—Where motion to dismiss was granted, judgment thereon may be final.*—Suit was dismissed on motion, and the court thereupon rendered judgment in favor of defendant for costs, and awarded execution accordingly. *Held*, that the judgment, though informal, was nevertheless final.—Flanagan v. Hutchinson, 237.

See PRACTICE, CIVIL—PLEADING, 11. REVENUE, 10.

JURISDICTION.

1. *Damages—Illinois railroads, whose chief place of business is not in St. Louis—Jurisdiction of courts of this State.*—In suit for damages against the Chicago, Alton and St. Louis Railroad Company, the proof showed that by defendant's charter its "chief office" was to be held in

JURISDICTION—(*Continued.*)

Chicago; that the company had an office in the city of St. Louis for the sale of tickets and for receiving and handling freight; but the general freight office, the offices of the president and secretary and the board of directors, were in Chicago. *Held*, that under the statute concerning corporations (Wagn. Stat. 292, § 19) the courts of this State had no jurisdiction.

Where the road terminates opposite the city of St. Louis, and has its chief office for the transaction of business in St. Louis, then the law regards it as a domestic corporation and amenable to the jurisdiction of our courts by the ordinary process of summons.—Robb v. Chicago & Alton R.R. Co., 540.

See ADMINISTRATION, 4, 6. PRACTICE, CIVIL—PARTIES, 1.

JURY.

See PRACTICE, CIVIL—TRIALS, 8, 9, 10. PRACTICE, CRIMINAL, 4, 5. ST. LOUIS, CITY OF, 6.

JUSTICES' COURTS.

1. *Courts, justices'—Appeal—Appearance of appellee after second day of term—Construction of statute.*—A proper construction of section 22 of the act concerning justices (Wagn. Stat. 850) does not require the appellee, in a cause carried to the Circuit Court from a justice's court, to enter his appearance on or before the second day of any subsequent term after the first at which the appeal is triable, in order to procure a hearing. If the appellee appear at such term when his case is called for trial, and announce himself ready, he should be treated as any other party in court upon summons or voluntary appearance.

In case of his appearance the appellant would be entitled to a reasonable time thereafter to prepare for trial.—Hammerstein v. Haase, 498.

See REVENUE, 10.

L

LANDS AND LAND TITLES.

1. *Conveyances—Life estate—Mortgage—Conditional estate—Reverter—Forfeiture.*—A deed from A. to B. conveyed a life estate in certain premises, remainder in fee to the children of A.; and provided that in case of the attempt of B. to sell or dispose of his interest or life estate, except to the children, that estate should cease and the property vest absolutely in the children. B. afterward conveyed away the property by mortgage. *Held*, first, that the mortgage, either in itself or as perfected by subsequent action, was a sale such as worked a forfeiture of the life estate; second, that such estate was not one upon condition, with a reversion to the grantor upon condition broken, as the entire estate passed out of him with no possibility of reverter; that hence no declaration of forfeiture on the part of the grantor was necessary to determine the estate of the grantee, but that his life estate terminated, and that of the children commenced, at once upon the making of the mortgage.—Gilker v. Brown, 105.

2. *Lands and land titles—Action for recovery of lands, limitations to—Acts in force when action commenced, not when cause of action accrued, must govern, when.*—Where the right of action for the recovery of real estate accrued in 1833, and plaintiff in the action became of age in 1849, suit brought in 1867, being less than twenty but more than ten years afterward, would be

LANDS AND LAND TITLES—(*Continued.*)

barred by the statute of limitations. The case would be governed by the act of 1847 (Sess. Acts 1847, pp. 94–5, §§ 1, 4) limiting the right of action to ten years, and not by that of 1825, allowing twenty years after the removal of disability within which to sue. The case would not be taken out of the provisions of the act of 1847 by section 15 of the act of 1855 (R. C. 1855, p. 1053). Under a proper interpretation of that section the action was subject to the laws in force at the time of the passage of the act of 1855, viz: the laws of 1847. The "laws" referred to in that section can have no reference to those in force when the right of action accrued, but when the act of 1855 took effect. It can have no reference to any acts of limitation prior to those of 1847. (See Billion v. Walsh, 46 Mo. 492.) — *Id.*

3. *Partition, sale in imports no warranty of title.*—In a suit by a sheriff on a note given by the purchaser of land at sheriff's sale in partition, for the payment of the purchase money, an answer averring failure of title in the grantor constitutes no defense. A sale in partition imports no warranty of title. The deed simply conveys the interest of the parties to the proceedings, and is only a bar against them and persons claiming under them.—Cashion v. Faina, 133.

4. *Lands and land titles — Confirmation — Patent — Equitable title — Ejectment.*—The legal title to lands confirmed under act of Congress of March 3, 1807 (2 U. S. Stat. 401), remains in the United States until the government issues its patent. The confirmation, therefore, vests in the confirmee nothing more than an equitable title, and such title constitutes no defense to a suit in ejectment as a matter of evidence, unless pleaded or in some way set up as an equitable bar to the action. —LeBeau v. Armitage, 138.

5. *Lands and land titles — Intention of parties to govern in description contained in deed.*—Where it was manifest, from a construction of the descriptive parts of a deed, in connection with its recital, that the parties intended, the one to grant and the other to acquire the title to lands, subject to the jurisdiction of the County Court of Washington county, in this State, and it further appeared that there were no other lands subject to that jurisdiction which met the calls of the deed, the deed sufficiently describes the land as located in this State, although it fails to state in terms that the land was situated in Missouri.

The intention of parties to a deed, in describing land, is to be deduced from the instrument, as in the case of any other contract.—Long v. Wagoner, 178.

6. *Lands — Swamp lands — Sale of by County Court, act of 1868 to validate, not unconstitutional.*—Certain swamp lands were sold by the County Court of Barton county. The court had full jurisdiction in the premises, but the sales were attended with informalities and irregularities. *Held*, that the act of March 26, 1868, validating the titles to those lands, was not unconstitutional as being retrospective in its operation.

As between individuals, the Legislature can not validate void deeds. But counties are not individuals. They are political divisions of the State; their functions are of a public nature; they hold their property in subordination and under the control of the Legislature.

The law distinguishes between sales by County Courts which are without authority and absolutely void *ab initio*, and those which are made by authority of law, but are informal and irregular.—Barton County v. Walser, 189.

LANDS AND LAND TITLES—(*Continued.*)

7. *Lands and land titles — Adverse possession.*—An uninterrupted, notorious, adverse possession of ten years, under claim of title in fee, operates to vest in the claimant so holding possession the title to the claimed land, as effectually as though such title had been acquired by deed. And in suit by claimant for the land, he is not estopped from setting up his possessory title in opposition to a paper title of defendant, by reason of his having procured a quit-claim deed to the property from defendant's grantor, when the purpose of that deed was not to defeat but to affirm existing rights; as where it was given to remedy an error in the description contained in the original deed to defendant's grantor of the land actually sold and intended to be conveyed.—Wall v. Shindler, 282.

8. *Lands and land titles — Erections, removal of — When personal property — License.* — When one builds a house or fence, or places any other erection upon the land of another, with his permission, and with the intention that it be held as the property of the builder, it continues personal property, and the owner may remove it when the license is withdrawn. (Matson v. Calhoun, 44 Mo. 368.—Lowenberg v. Bernd, 297.

9. *Lands and land titles—Boundaries—Verbal agreement—Subsequent description in deed given by mistake.*—A verbal agreement, accompanied by possession and improvement, permanently locating a division line, is founded upon a good consideration, is not contrary to the statute of frauds, and will bind the parties and their privies. And one holding under a party to such an agreement may invoke it, although his deed of purchase by mistake prescribed a different line. The agreement would not be merged in or overruled by the deed.—Kincaid v. Dormey, 337.

10. *Lands and land titles—Division fence — Land occupied by mistake not held adversely, when.*—One holding by mistake up to a division fence and over the true line, without intending to own anything more than what is embraced in the true line, does not hold the space intermediate between that line and the division fence adversely to the rightful owner.—*Id.*

11. *Lands and land titles—Surveyor—Plats and field-notes — Magnetic variation — New and old lines.*—When a surveyor makes and describes a new line by courses and distances, his plats and field-notes must show the magnetic variation from the meridian; but in establishing old quarter-section corners (Wagn. Stat. 1312, § 31), or in establishing center corners upon the open lines (*id.* 1310, § 24), the surveyor need not ascertain the magnetic variation.—*Id.*

12. *Lands and land titles — Conveyances — Equitable title.*—The general rule is that a purchaser must at his peril inquire into the state of his grantor's record title, since he will be affected with constructive notice of all duly-recorded conveyances by his grantor affecting the same; and the rule will hold as to the vendee of equitable title merely, as where the holder of a title bond for the conveyance of land gives his deed of trust to secure the purchase money, and before foreclosure sells and delivers to another the title. It makes no difference that in such a case the grantor had vested in himself no title of record.—Digman v. McCollum, 372.

13. *Lands and land titles—Quieting of titles, action for — Dower, unassigned — Adverse claim — Limitation, act of.*—An unassigned dower interest in land is neither a title nor an estate in the scientific sense of those terms, but it is an adverse "claim" which the holder may be called upon to defend under

LANDS AND LAND TITLES—(*Continued.*)

the statute relating to the quieting of titles (Wagn. Stat. 1022, § 53). And a judgment in such a proceeding would bar the right of dower. And suit to compel the claimant of a dower interest to come in and defend her rights is proper, notwithstanding that it might restrict the time otherwise given her, under the statute of limitations, within which to test her claim of dower.—Benoist v. Murrin, 537.

14. *Lands and land titles—Tenants in common—Adverse possession by one as against others—Limitations, statute of.*—One of a number of tenants in common took the sole possession of land and held the same continuously for more than ten years, claiming the same as his own exclusive property and taking the rents and profits to his own exclusive use. The other co-tenants were aware of his possession and his claim, but set up no claim to the adverse possession, and, on the contrary, manifested a perfect and entire acquiescence. *Held*, that in this State the co-tenant in possession will be considered as having created a statutory bar against the title of the others.—Lapeyre v. Paul, 586.

15. *Lands and land titles—Tenants in common—What act will show adverse possession by one against the others.*—The presumption of law is that the possession of one tenant in common is the possession of the co-tenants as well. Unity of possession is of the very essence of tenancy in common. Hence, in consequence of this legal presumption, to establish the title of one co-tenant against another, there must be on his part outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and an actual disseizin are intended to be asserted against them.—*Id.*

See CONVEYANCES, 5. EQUITY, 11. FORCIBLE ENTRY AND DETAINER, 1.

LARCENY.

See PRACTICE, CRIMINAL, 11.

LEASE.

1. *Equity—Action to divest title—Agreement, when of the essence of a contract—Payment stipulated in cases affecting minors—What sufficient compliance with stipulation.*—In suit by a lessee against the heirs of his lessor, to divest the title out of defendants and vest it in plaintiff, it appeared that by the terms of an agreement between the parties, plaintiff was to have the privilege of purchasing the fee simple at any time within five years, but was required, if he elected to purchase, to give thirty days' notice of his intention to purchase, and to make payment of one-fourth. *Held:*

1. That notice given two days before the expiration of the five years was too late.

2. That defendants being minors, it was sufficient for plaintiff to aver his readiness to make the payment called for and to pay the money into court, subject to its order.

3. That the thirty days' notice was of the essence of the contract. The offer to sell within five years was simply a proposition without mutuality between the parties. For that reason time was of the essence of the agreement, and the acceptance must have been in accordance with the offer.

4. It was immaterial that defendants, being minors, were unable to convey.

LEASE—(*Continued.*)

The notice was not a demand for a deed, but a stipulated act that would so obligate the defendants that the court, as the guardian of the rights of infants, would order a conveyance.—Mason v. Payne, 517.

LICENSE.

See REVENUE, 5, 6, 7, 8.

LIEN, VENDOR'S.

1. *Sales—Vendor's lien waived by taking collateral security.*—It is the settled law in this State that where the vendor of land takes collateral security for the purchase money, he will be presumed to have waived his lien upon the land conveyed; and if he entertained a different intent, he must show it by satisfactory testimony.—Durette v. Briggs, 356.

LIMITATIONS.

1. *Limitations, statute of—Acknowledgment and promise, what sufficient to avoid the statute.*—An acknowledgment of indebtedness, in order to take a case out of the statute of limitations, must contain an unqualified and direct admission of a present subsisting debt on which the party is liable and willing to pay.

An offer to compromise and a promise to pay part of an amount claimed if the offer were accepted, where the creditor refused to accept, was not an acknowledgment of an absolute subsisting debt, coupled with an admission that the party was liable and willing to pay, such as to remove the bar of the statute. Till the acceptance of the offer the liability did not accrue.—Chambers v. Rubey, 99.

2. *Lands and land titles—Actions for recovery of lands, limitations to—Acts in force when action commenced, not when cause of action accrued, must govern, when.*—Where the right of action for the recovery of real estate accrued in 1833, and plaintiff in the action became of age in 1849, suit brought in 1867, being less than twenty but more than ten years afterward, would be barred by the statute of limitations. The case would be governed by the act of 1847 (Sess. Acts 1847, pp. 94-5, §§ 1, 4) limiting the right of action to ten years, and not by that of 1825, allowing twenty years after the removal of disability within which to sue. The case would not be taken out of the provisions of the act of 1847 by section 15 of the act of 1855 (R. C. 1855, p. 1053). Under a proper interpretation of that section the action was subject to the laws in force at the time of the passage of the act of 1855, viz: the laws of 1847. The "laws" referred to in that section can have no reference to those in force when the right of action accrued, but when the act of 1855 took effect. It can have no reference to any acts of limitation prior to those of 1847. (See Billion v. Walsh, 46 Mo. 492.)—Gilker v. Brown, 105.

3. *Corporations—Lexington Railroad and Coal Mining and Transportation Company—Act of limitation.*—Suit brought against a stockholder of the Lexington Railroad and Coal Mining and Transportation Company (see Wagn. Stat. 291, § 13), more than a year after the debt was contracted, was barred by the statutory limitation of the act touching manufacturing and business companies (Wagn. Stat. 336, § 13). The one-year limitation of time for commencing suit was not so short as to justify the Supreme Court in declaring it unreasonable, and the law for that reason invalid. The act was wholly prospective, and therefore constitutional.—Adamson v. Davis, 268.

See LANDS AND LAND TITLES, 7, 13, 14, 15.

M

MANSLAUGHTER.

See PRACTICE, CRIMINAL, 16, 17

MECHANICS' LIENS.

1. *Mechanic's lien — Notice signed by one of several joint contractors, for all, sufficient.*—In suit on a mechanic's lien, brought by several joint contractors, the notice of suit required by the statute (Gen. Stat. 1865, p. 768, § 19; Wagn. Stat. 911, § 19) need not be signed by each contractor, but will be sufficient if signed by one for all.

A mechanic's lien filed by joint contractors first gave the several names of the lienors, and afterward referred to them as "the said 'A.' & Co." The paper was signed by the firm name. *Held*, that the lien was sufficient under the statute (Wagn. Stat. 909, § 6), although it was not formally alleged that the lienors composed the firm name of "'A.' & Co."—Miller v. Faulk, 262.

2. *Mechanic's lien, suit upon — Party defendant — Church.* — In suit on a mechanic's lien for work done on a church, plaintiff may bring suit without making the church corporation a party defendant.— *Id.*

3. *Mechanic's lien — Judgment against 160 acres, improper.*—Judgment against the entire farm of defendants, containing 160 acres, is unwarranted by the statute.— Engleman v. Graves, 348.

4. *Mechanic's lien — Married women, separate property of, when liable to lien.* —A married woman was shown to have had personal knowledge of work done and material furnished on her separate estate, and to some extent to have given personal directions respecting it, although her husband was the principal manager. It was also shown that she joined her husband in the execution of a note in settlement of the claim; the claimants, however, declining to receive the note in adjustment of their demand. *Held*, that under such circumstances the property might be subjected to a mechanic's lien.— Collins v. Megraw, 495.

5. *Practice, civil — Pleadings — Note, motion for production of — Default for failure to answer, etc.*—In a mechanic's lien suit, plaintiff declared upon an account for lumber, filing an itemized copy with the petition, but stated that defendant's wife closed the account by a note for the amount "herewith filed." The note was not filed, and defendant, without answering, filed a motion for an order on plaintiff to file the note. *Held*, that a motion going to the merits of the petition should dispense with the necessity of answering till it is disposed of; but that such a motion was frivolous, and plaintiff was entitled to judgment notwithstanding for want of an answer.

If a defendant can not intelligibly answer without an inspection of a paper in plaintiff's possession, he should obtain an extension of time to answer, and diligently prosecute his petition under section 40, Wagn. Stat. 1045, for an inspection and copy of the paper.— Hill v. Meyer, 585.

MISDEMEANOR.

See CRIMES AND PUNISHMENTS.

MISTAKE.

See AMENDMENTS. CONVEYANCES, 4. EQUITY, 11. REVENUE, 11.

MORTGAGES AND DEEDS OF TRUST.

1. *Sale of land — Description.* — Although a deed of trust described the real estate conveyed as two separate parcels of land, yet where it appeared that the parcels constituted but one farm, and by the advice of the trustees and with the assent of the beneficiary they were sold together, such sale was proper. Kellogg v. Carrico, 157.

2. *Mortgages, satisfaction of entered on record — Ten per cent. damages.* — Whenever any person whose property stands encumbered on the records has paid off and made full satisfaction of the mortgage or deed of trust constituting the encumbrance, he is entitled to have that satisfaction entered on the margin of the record, in order that he may exhibit a clear title, and that persons examining the records may not be misled. In case satisfaction is not entered he will be entitled to ten per cent. damages, whether the payment was received voluntarily or effected through the machinery of the courts.—Verges v. Giboney, 171.

3. *Deed of trust — Title passes to mortgagee after condition broken.* — In a mortgage, or a deed of trust in the nature of a mortgage, the legal title, after condition broken, passes to the mortgagee or trustee. And the addition of a power to sell without judicial proceedings to foreclose can not avoid the legal effect of the grant. The trustee, after dishonor of the trust notes, could enter, and, without sale or foreclosure, could maintain his possession for the use of the beneficiary not only against all outsiders, but against the maker of the deed himself, until the payment of the trust note.—Johnson v. Houston, 227.

4. *Ejectment — Mortgage and deed of trust — Conveyance of land after condition broken by beneficiary, effect of.* — A married woman having purchased certain land, gave her notes for the purchase money, secured by deed of trust executed by herself jointly with her husband. The note being unpaid at maturity, the beneficiary, instead of the trustee in the deed, entered the premises, and, without sale under the trust deed, conveyed away the estate.

   In ejectment by the maker of the deed of trust against the grantee of the beneficiary, *held*, that a stranger could not set up against the maker a title in another that arose from the deed of trust; but that defendant was not a stranger, for the conveyance to him, although it did not pass the legal title, operated as an assignment of the equity of the beneficiary. The grantee succeeded to all the rights of the grantor, and, being in possession, could defend successfully against the action until plaintiff paid the note. And *held*, further, that the claim of plaintiff would not be aided in law or equity by the fact that she was a married woman, and that the notes were executed by her as such.— *Id.*

5. *Mortgages and deeds of trust, foreclosure of — Installments on same note, suits upon — Cause of action.* — The pendency of a suit to foreclose a mortgage for the non-payment of one annual installment on a note is not sufficient ground for the abatement of a subsequent suit to foreclose the same mortgage, based on the non-payment of the next annual installment on the same note. Although the parties to the note and the mortgage are the same, yet the subsequent suit would be founded upon a different cause of action, and hence would not be deemed vexatious. It is immaterial that the evidence, as respects the instrument sued on, was the same.—Jacobs, Adm'r of Lewis, v. Lewis, 344.

MORTGAGES AND DEEDS OF TRUST—(*Continued.*)

6. *Conveyances — Deeds, absolute, coupled with agreement to convey a mortgage.* — A deed absolute on its face, coupled with an agreement that on payment of a given sum the grantee would convey, is a mortgage.— Sharkey v. Sharkey, 543.

7. *Attachment, claim for property under — Act of 1865 — Deed of trust, beneficiary in, party in interest.*— The beneficiary in a deed of trust of personal property is a party in interest, under the act of March 3, 1865, "concerning the duties of sheriff in St. Louis county" (Gen. Stat. 1865, ch. 160, §§ 28-9), and may file his claim with the sheriff and sue upon the bond taken.— State, to use of Peters, v. Koch, 582.

8. *Conveyances — Deed of trust — Sale — Merger.*— The grantee of personal property under a deed of trust does not forfeit his title under the deed by reason of the fact that the same property is afterward transferred to him by an absolute bill of sale which is void because not followed by a change of possession. (Wagn. Stat. 281, § 10.) The title under the deed does not merge in that acquired by the sale. The legal title under the deed was in the trustee, and the subsequent sale was only that of an equity.— *Id.*

See CONVEYANCES, 1. TRUSTS AND TRUSTEES, 8.

N

NEGLIGENCE.

See AGENCY, 4. DAMAGES, 4, 5, 6.

NODAWAY COUNTY.

See RAILROADS, 1.

NOTICE.

See ATTACHMENT, 1. CONVEYANCES, 5. LEASE, 1. MECHANIC'S LIEN, 1. PUBLICATION.

O

OFFICERS.

1. *Quo Warranto — Public office — Vacancy, power of County Court as to.*— Where one had been duly elected to a public office, had duly qualified and had entered upon its duties, and his term of office had not expired, but he had been unable to attend to its duties for a period of fifty days: *held*, that the County Court had no authority under the statute (Gen. Stat. 1865, p. 226, § 4) to declare the office vacant and fill it by appointment. This statute confers no jurisdiction upon the County Court to act in the premises until a vacancy actually exists.— State ex rel. Kiel v. Baird, 301.

2. *Insanity, how ascertained.*— The statutes provide for an inquiry into cases of alleged insanity, and enact a mode of proceeding by jury. An action of the County Court declaring a public office vacant by reason of the insanity of the incumbent, where this mode was not adopted, was unwarranted by law. — *Id.*

See CRIMINAL LAW, 2. ELECTIONS, 1, 2, 3. REVENUE, 10. SCHOOLS, 1.

ORDINANCES, CITY.

See ST. LOUIS, CITY OF.

P

PARTITION.

1. *Partition, sale in imports no warranty of title.*—In a suit by a sheriff on a note given by the purchaser of land at sheriff's sale in partition, for the payment of the purchase money, an answer averring failure of title in the grantor constitutes no defense. A sale in partition imports no warranty of title. The deed simply conveys the interest of the parties to the proceedings, and is only a bar against them and persons claiming under them.—Cashion v. Faina, 133.

PARTNERSHIP.

1. *Partnership—Account stated—Admissions.*—The admission by one of two partners of the correctness of an account stated against the partnership is sufficient in a suit against the firm on such account, even though for want of service the suit has been dismissed as to the partner making the admission.—Cady v. Kyle, 346.
2. *Partnership—Members liable, jointly and severally—Agreements between, etc.*—Under the statute (Wagn. Stat. 269, § 1) the members of a collecting firm are liable jointly and severally for the money collected. And one member will be liable for money collected by the other, although the partnership had been dissolved and it had been agreed that the former should wind up the business.

   And in suit against the former for proceeds of money collected by the firm, the fact that defendant notified the sheriff not to pay over the money to his partner will not exonerate him.—Bryant v. Hawkins, 410.
3. *Partnership—Verbal agreement, contrary to statute of frauds, binding if carried out.*—In suit on a partnership account it appeared that A. and B., members of the firm, being about to trade with C., agreed with him verbally that payments by the firm should be first applied to satisfy a pre-existing debt owing by A. *Held*, that although the agreement might have been contrary to the statute of frauds, and therefore incapable of enforcement, yet if the parties went on and complied with its terms, and applied the payment to the old account, they could not repudiate it and afterward apply the payments to that of the firm.—Mueller v. Wiebracht, 468.

PRACTICE, CIVIL—ACTIONS.

1. *Ejectment—Judiciary act—Magwire v. Tyler—What points properly decided by the Supreme Court.*—Under section 25 of the judiciary act, the Supreme Court of the United States is confined to questions arising under laws of the United States, and can not consider any distinct equity arising out of contracts or transactions between parties. And the only thing which that court could decide in the case of Magwire v. Tyler was the validity of the respective confirmations to Brazeau and Labeaume.

   Under the decision of the Supreme Court in that case (8 Wall. 650) the legal title vested in plaintiff, and under that ruling his proper remedy was ejectment. But suit was brought by bill in equity, and should be dismissed.—Magwire v. Tyler, 115.
2. *Equity—Ejectment—Bill to set aside deed and vacate title can not be united with suit for possession.*—In a bill to set aside a deed as fraudulent,

PRACTICE, CIVIL—ACTIONS—(*Continued.*)

the plaintiff can not sue for the recovery of the possession of the land; and proceedings instituted for the purpose of vacating title, vesting it in plaintiff, and to eject defendant and obtain possession, are fatally erroneous on writ of error or appeal, and can not be sustained. When the decree is entered establishing plaintiff's title, he must then pursue his remedy in ejectment for the possession. The defendant has a right to have a jury to pass upon the question of rents and profits and upon other questions which may arise in that form of action.—*Id.*

3. *Equity—Statute changes only form of action—Court will not interfere in an action strictly equitable.*—Although, under the statute (Wagn. Stat. 999, § 1), legal and equitable cases are to a certain degree blended as to form, the principles remain the same, and the court will not interfere and exert its equity powers in a strictly legal action. The innovation extends only to the form of action in the pleadings. The party need only state his cause of action in ordinary and concise language, whether it be in assumpsit, trover, trespass, or ejectment, without regard to ancient forms; but the distinction between the actions remains the same.

To entitle plaintiff to an equitable interference of the court, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate and complete relief at law.—*Id.*

See ATTACHMENT. FORCIBLE ENTRY AND DETAINER, 1. HUSBAND AND WIFE, 12. MORTGAGES AND DEEDS OF TRUST, 5. PRACTICE, CIVIL—PLEADING, 8. REPLEVIN. TRESPASS.

PRACTICE, CIVIL—APPEAL.

1. *Practice, civil—District Courts—Assignment of errors—Statement of case—Failure to file.*—The failure of appellant to file an assignment of errors and statement of the case before the District Court (Gen. Stat. 1865, ch. 135, § 38) up to the time when the case is reached upon the docket, is proper ground for dismissing the appeal.—State ex rel. Lathrop v. Dowling, 103.

2. *Practice, civil—District Court, no record of judgment in, effect of.*—In a case properly appealable through the District Court, where the record sets out no judgment of the District Court, and nothing to show that the cause is not still pending there, the case should be dismissed and stricken from the docket.—Howell v. Reynolds County, 104.

3. *Practice, civil—Appellate court will not disturb a verdict because against the weight of evidence.*—An appellate tribunal will not reverse simply because the verdict is against the weight of evidence, but to justify such an interference there must be a total and complete failure of testimony tending to support the issue.—McKay v. Underwood, 185.

4. *Practice, civil—Writ of error will lie to action of court on motion.*—When the overruling of a motion is a final and complete disposition of the subject-matter of a cause, the action of the court may be reviewed without a final judgment. Writ of error will lie to the action of the court on a motion without a final judgment.—Gale, Adm'r of Maupin, v. Michie, 326.

5. *Practice, civil—Judgment—Motion for new trial.*—Where appellant fails to move for a new trial, the judgment of the lower court will not be disturbed.—Beatty v. Furnald, 348.

PRACTICE, CIVIL—APPEAL—(*Continued.*)

6. *Practice, civil — Appeal — Judgment — Failure to file statement and brief.* —When defendant fails to file a statement and brief, as required by statute, the judgment will be affirmed.— O'Neill v. Doyle, 398.

See ADMINISTRATION, 11. COURT, ST. LOUIS CIRCUIT, 1. EQUITY, 13. JUSTICES' COURTS, 1. PRACTICE, CIVIL—PLEADING, 2, 3. PRACTICE, SUPREME COURT. REVENUE, 17, 18.

PRACTICE, CIVIL—PARTIES.

1. *Practice, civil — Parties — Jurisdiction where defendants reside in different counties.*—Under the practice act (Wagn. Stat. 1005), when there are several defendants, and they reside in different counties, the suit may be brought in any such county, and ordinarily the plaintiff would have the right to select the county for the institution of the suit; but jurisdiction must be fairly acquired, and can not be maintained when it is sought to be obtained by fraudulent representations for the purpose of oppression.— Capital City Bank v. Knox, 333.

See FRAUDULENT CONVEYANCES, 1.

PRACTICE, CIVIL—PLEADING.

1. *Attachment — Plea in abatement waived by pleading to merits — Amendment in law, effect of.*—Under the statute of 1855 (R. C. 1855, p. 252, § 47) a plea in abatement was waived by answering to the merits, and the rule is not modified by the amendment contained in the present statute, which provides that the suit shall proceed and be disposed of upon its merits, notwithstanding the defendant may succeed on his plea in abatement.— Green v. Craig, 90.

2. *Practice, civil — Exception — Amendment.*—Although defendant may except to the action of the court in striking out his answer, yet by afterward answering over he waives his right to avail himself of his exception.— Gale, Adm'r of Maupin, v. Foss, 276.

3. *Practice, civil — Amendment, filing of, permission as to rests largely in the discretion of court.*—The filing of amended pleadings is a matter resting largely in the discretion of the court. And where an answer was sought to be filed after the impaneling of the jury and the hearing of plaintiff's case, which changed materially the whole aspect of the suit, and no reason appeared why it was not filed earlier, the Supreme Court would not interfere with the exercise of that discretion in the lower court in refusing to allow the amendment.— *Id.*

4. *Practice, civil — Equitable offset — Mortgage — Surety — Injunction, etc.*— In a suit on a note or account, an answer alleging that plaintiff is insolvent, and that defendant is liable, as plaintiff's surety, upon an over-due promissory note to a third party; that a suit had been commenced to foreclose a mortgage given by plaintiff to secure the note, and that the mortgaged property, in the opinion of defendant, will prove insufficient to pay the note in full, discloses no existing claim in favor of the defendant against the plaintiff, either legal or equitable, nor does it show any ground for enjoining the suit. — Hopkins v. Fechter, 331.

5. *Practice, civil — Pleadings — Parol and written contracts, when sued on, must be distinctly stated.*— Parties may, by a subsequent parol agreement, upon a sufficient consideration, change or modify the terms of their written

PRACTICE, CIVIL—PLEADING—(*Continued.*)

contract. But in suits on contracts of this nature the contracts must be distinctly set forth. Thus, where in a suit to recover insurance money for goods lost by fire, the petition set forth an absolute independent agreement, disconnected with any other previous transaction, it would not be competent for the plaintiff, in that state of pleadings, at the trial, to graft a verbal on a prior written contract.—Henning v. United States Ins. Co., 425.

6. *Practice, civil—Pleadings—Answer—New matter must be set forth in pleadings.*—Under the old system of pleading the general issue, everything was open to proof which went to show a valid defense; but under the present practice act (Wagn. Stat. 1015, § 12), if defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he must set it out according to the statute, in ordinary and concise language; otherwise he will be precluded from giving evidence of it at the trial.—Northrup v. Mississippi Valley Ins. Co., 435.

7. *Practice, civil—Pleading—Demurrer—Defendant answering over, abandons.*—Defendant, by answering upon the merits after demurrer overruled, virtually withdraws and abandons the demurrer, although he makes no formal withdrawal.—Pickering v. Mississippi Valley National Telegraph Co., 457.

8. *Practice, civil—Motion in arrest—Misjoinder of causes of action in same count.*—A motion in arrest does not bring up any question in relation to the mingling in the same count of different causes of action. A motion in arrest is designed to test the sufficiency of a petition or the sufficiency of the several counts therein.—*Id.*

9. *Practice, civil—Pleading—Breaches of a contract treated as independent causes of action—Objection to, can not be raised by motion in arrest.*—Whatever objection there may be to the technical accuracy of setting out each breach of a contract as a separate and independent cause of action, such objection is not available in a motion in arrest of judgment.—*Id.*

10. *Practice, civil—Pleadings—Negative pregnant, what averments not.*—In suit against an insurance company upon a draft, the petition alleged that defendant, "by draft in writing, signed by its secretary," made the obligation sued on. An answer denying that the company, "by its draft in writing, signed by its secretary," executed the obligation alleged, although inartistic, under our system is sufficient.—First National Bank of Kansas City v. Hogan, 472.

11. *Practice, civil—Pleadings—Answer—Reply—New matter—Judgment.*—In suit under the statute against a stockholder in a corporation, defendant, after admitting the insolvency and dissolution of the corporation as charged in the petition, alleged that his stock was paid in full, and that he had in addition paid corporation debts to an amount exceeding the total amount of his stock. *Held*, that the answer set up new matter which could alone be put in issue by a reply; and there being no reply, the facts stood admitted, and the judgment followed as of course. An averment in the answer of the medium of payment—as that it was in money—was wholly unnecessary.—Ennis v. Hogan, 518.

12. *Practice, civil—Pleadings—Reply, when result of accident or mistake, may be set aside.*—Where the failure to reply is the result of accident or mistake, the judgment may be set aside on reasonable terms where the motion to set aside is made in the term.—*Id.*

PRACTICE, CIVIL—PLEADING—(*Continued.*)

13. *Practice, civil — Pleading — Note, motion for production of — Default for failure to answer, etc.* — In a mechanic's lien suit, plaintiff declared upon an account for lumber, filing an itemized copy with the petition, but stated that defendant's wife closed the account by a note for the amount "herewith filed." The note was not filed, and defendant, without answering, filed a motion for an order on plaintiff to file the note. *Held*, that a motion going to the merits of the petition should dispense with the necessity of answering until it is disposed of; but that such a motion was frivolous, and plaintiff was entitled to judgment notwithstanding for want of an answer.

If a defendant can not intelligibly answer without an inspection of a paper in plaintiff's possession, he should obtain an extension of time to answer, and diligently prosecute his petition under section 40, Wagn. Stat. 1045, for an inspection and copy of the paper. — Hill v. Meyer, 585.

See ADMINISTRATION, 5. CONTRACTS, 11. REPLEVIN, 1.

PRACTICE, CIVIL — TRIALS.

1. *Practice, civil — Evidence — Verdict — New trial.* — Trial courts, if they believe that injustice has been done by the verdict, may grant a new trial, although they would not be justified in taking the issue from the jury, and although the appellate court could not in such cases interfere. — Lockwood v. Atlantic Mutual Ins. Co., 50.

2. *Practice, civil — Issues in equity may be framed by the chancellor — Where not abused, the power will not be interfered with.* — It is permissible for a chancellor, in his sound discretion, to frame issues and take the opinion of a jury for his guidance; and when this power is not abused or wrongfully exercised it will not be interfered with. (Wagn. Stat. 1041, § 13.) — Looker v. Davis, 140.

3. *Practice, civil — Set-off, when greater than the amount claimed — Nonsuit.* —Under the provisions of our statute (Wagn. Stat. 1021, § 47) plaintiff may take a nonsuit although defendants plead a set-off exceeding the amount sued for. — Fink v. Bruihl, 173.

4. *Practice, civil — Actions — General verdict, when petition sets out different causes of action, bad.* —When a petition sets out several distinct causes of action, a verdict for an entire and gross sum can not be sustained. There should be a separate assessment on each cause or count, in order that the court may know how the issues were found and what amount was assessed on each count. But if there is one entire cause of action, and one good count in the declaration, a general verdict and general assessment of damages will answer. — Brownell v. Pacific R.R. Co., 239.

5. *Practice, civil — Damages, action for, against railroad company — Cause of action — Count — General verdict.* —In suit against a railroad company for the killing of plaintiff's husband, the petition embraced two counts, framed respectively on the second and third sections of the act relating to damages (Wagn. Stat. 519-20). The first count charged that the killing was caused indirectly by the corporation, through the negligence, unskillfulness, and criminal intent of its employees; the second, that the death was owing directly to the neglect or default of the company. *Held*, that the two counts contained but one subject-matter of complaint, viz: the killing of complainant's husband; and therefore but one cause of action, although

PRACTICE, CIVIL—TRIALS—(*Continued.*)

stated in different ways to meet the evidence. Hence there could be but one verdict and one assessment.

A verdict based on either section would be a complete bar to a prosecution of the action on the other section. And where such is the case the cause of action must necessarily be the same.—*Id.*

6. *Practice, civil—Trial, judge of neighboring court may preside at, when, under section 17, article IV, of the State constitution.*—The judge of a Circuit Court may procure another judge to hold a particular term of court, giving up to him the whole business of the term; but he is not authorized, in order to prevent a change of venue in a particular cause, or for any other reason, to call in a neighboring judge to try that cause. And if he does call him in, although he try it never so fairly, it is a trial without authority of law, and his decision has no binding force.—Gale, Adm'r of Maupin, v. Michie, 826.

7. *Practice, civil—Trial—Venue, change of, matter of right.*—It is the duty of an interested judge, on motion, without application from either party, to award a change of venue, especially when those who present it insist on the change.—*Id.*

8. *Sales, questions of fact touching, submitted to the jury.*—In the sale of personal property, where there is any conflict of testimony, questions as to whether the vendor intended by the bill of sale to vest immediate title in the vendee, and whether there was a delivery to and subsequent possession by the vendee, are issues which, under proper instructions, should be submitted to the jury.—Jones, Adm'r of Seals, v. Hook, Adm'r of Reed, 329.

9. *Practice, civil—Chancery, issues in, opinion of the jury may be taken touching, etc.*—In the progress of a chancery proceeding the chancellor has the undoubted right to take the opinion of a jury on one or all of the issues arising in the cause. He may adopt their conclusion, but is not bound by it.—Hickey v. Drake, 369.

10. *Practice, civil—Jury, special—Impaneling of, may be ordered, when.*—A court may, in its discretion, order a special panel to try a cause, and such order is no ground of objection unless it appear that the party objecting was prejudiced or injured by the action of the court.—Union Savings Association v. Edwards, 445.

11. *Practice, civil—Weight of evidence—Referee.*—Issues triable by a jury may be referred to a referee, and in that case the referee is the sole judge of the weight of evidence, subject to review by the trial court. Appellate courts will not examine his decision touching weight of testimony.—Daly v. Timon, 515.

See EQUITY, 13. JUDGMENTS, 2. PRACTICE, CIVIL—PLEADING, 8, 13.

PRACTICE, CRIMINAL.

1. *Practice, civil—Selling liquor on Sunday—Indictment.*—Prior to the act of 1868, persons might be guilty of jointly keeping open tippling shops and selling liquors on Sunday, and might be jointly indicted for misdemeanor therefor.—State v. Murphy, 274.

2. *Criminal law—Indictments—Counts, what charges may be united in.*—Where a statute in one clause forbids several things or creates several offenses which are not repugnant in their nature or penalty, the clause is treated in pleadings as though it created but one offense, and they may all be united

conjunctively in one count, and the count is sustained by proof of one of the offenses charged.— *Id.*

3. *Criminal law — Indictment — Signature of circuit attorney — Certificate by foreman of grand jury.*—The signature of the circuit attorney is not required to an indictment, and the want of a certificate thereto by the foreman of the grand jury can only be taken advantage of by motion to quash; and the motion to quash, to avail anything, must specify this defect.— *Id.*

4. *Practice, criminal — Verdict — Jury — Discharge — Consent of prisoner.*— In criminal trials the court has the undoubted authority, in its discretion, to discharge a jury when satisfied that they would be unable to agree on a verdict, and without procuring the consent of the prisoner.— State v. Matrassey, 295.

5. *Practice, criminal — Verdict — Separation of jury no ground for new trial, when.*—The mere fact of a separation of the jury in a criminal case will not invalidate a verdict or furnish ground for a new trial, there being no reason to suspect that they have been tampered with or that they have acted improperly. (State v. Brannon, 45 Mo. 329.)— *Id.*

6. *Practice, criminal — Indictment — Degree of offense need not be specified in verdict, when.*—Under the present law (Wagn. Stat. 1107, § 1) it is unnecessary for the jury to specify the degree of the offense unless they convict of an inferior degree to the one charged in the indictment.— *Id.*

7. *Practice, criminal — Motion to quash must state what.*— A general statement, in a motion or demurrer to quash an indictment, that the same is defective and insufficient, does not comply with the statute (Wagn. Stat. 1090, § 24). The specific defect must be pointed out. — State v. Marshall, 378.

8. *Criminal law — False affidavit, information as to — Allegation.*— In an information under the statute (Wagn. Stat. 476, § 4) for making a false affidavit, if the authority of the magistrate to administer the oath is clearly asserted, that is sufficient, and the information need not set out the various facts which would authorize him to act as magistrate, such as his election, qualification, etc.— *Id.*

9. *Criminal law — Indictment — False oath, allegations as to.*—In indictments for making false affidavits it has always been held that if the materiality of the oath appear from the facts or documents set forth in the indictment, it is sufficient without any express allegation on the subject. — *Id.*

10. *Practice, criminal — Evidence in criminal cases examined in the Supreme Court.*—In criminal cases this court has always felt under obligation to examine the record and direct a new trial if conviction is not warranted by the evidence.—*Id.*

11. *Practice, criminal — Indictment — Larceny — Checks and coin, description of, what insufficient.*— An indictment for larceny, which described the property stolen as "one check for five thousand dollars on the Traders' Bank, of the value of five thousand dollars; five thousand dollars in money, of the value of five thousand dollars," should be held insufficient on demurrer.

Some further matter of description should be embodied so as to inform defendant of the specific check intended. Section 31 of the act in reference to practice in criminal cases (Wagn. Stat. 1091-2) does not include checks. And under that section, where coin of the United States is referred to, the

PRACTICE, CRIMINAL—(*Continued.*)

simple designation of it as money, without describing it as money made or issued by virtue of any law of the United States, is too indefinite.—State v. Kroeger, 530.

12. *Practice, criminal—Indictment, allegations in—Repugnancy.*—An indictment charged defendant with forging a check "purporting to be the act of M. E. Susisky, treasurer of the city of St. Louis." The check afterward set out showed the signature of "M. E. Susisky, treasurer." *Held*, that the two allegations were not inconsistent with and repugnant to each other. (State v. Finley, 18 Mo. 445.)—State v. Kroeger, 552.

13. *Criminal law—St. Louis city treasurer—Blank check, filling out and using for a different purpose than that directed, constitutes forgery.*—The treasurer of the city of St. Louis left with A. certain blank checks, with directions to fill them up to the use of holders of warrants against the city; but A. took one of the checks, inserted the date and amount, and the words "cash or bearer" in place of the words "order of," erased from the printed blank. By whom the words were erased did not appear. A. converted the check to his own private use, by depositing it in bank the same day on his private account, and drawing the money on it for his own use. *Held*, that under the statute law of this State (Wagn. Stat. 470, § 16) he was guilty of forgery in the third degree. As the check had been signed with specific instructions to use it for a certain purpose, A., in thus filling it up for a different purpose, clearly made a false instrument.—*Id.*

14. *Criminal law—Homicide—Indictment—Threats and admissions of deceased, when admissible as res gestæ.*—In the trial of an indictment for murder, threats by the deceased against defendant, which were frequent and continuous down to the time of killing, and all blended together and inseparable, would be considered as a part of the *res gestæ*, and evidence touching them would be admissible to explain the act and show whether defendant acted in necessary self-defense. And testimony of the deceased, immediately after the tragedy, exculpating defendant, would be admissible on the same principle.—State v. Sloan, 604.

15. *Criminal law—Homicide—Killing on apprehension of bodily harm.*—Where a person apprehends great bodily harm, and there is reasonable ground for believing that the danger is imminent that such design will be accomplished, he may safely act on appearance, and even kill the assailant if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterward turn out that the appearances were false—that there was in fact neither design to do him serious injury nor danger that it would be done.—*Id.*

16. *Criminal law—Manslaughter, court shall instruct jury as to what constitutes.*—When a jury is instructed that, under an indictment for murder, defendant may be convicted of manslaughter, it is gross error not to define what it takes to constitute manslaughter.—*Id.*

17. *Criminal law—Manslaughter in first degree implies something more than intentional violence.*—In order to bring a case within the definition of manslaughter in the first degree, it is necessary to show that defendant was committing or attempting to commit some other offense than that of intentional violence upon the person killed.—*Id.*

PRACTICE, SUPREME COURT.

1. *Practice, Supreme Court — Appeal — Failure to file transcript.* — When appellant fails to prosecute his appeal as required by law, and respondent files a complete transcript of the record and moves for an affirmance of the judgment, no reasons appearing why it should not be done, the motion will be granted. — Bausman v. Kirtley, 28.
2. *Practice, Supreme Court — Appeal — Failure to file transcript.* — When appellant fails to prosecute his appeal as required by statute, and respondent presents to this court a perfect transcript, no reasons being shown to the contrary, motion for affirmance of judgment will be sustained. — Bobb v. Comfort, 36.
3. *Practice, Supreme Court — Failure of appellant to file transcript in time — Affirmance.* — When it appears that promptness and diligence on the part of the appellant in bringing up his transcript are wholly wanting, his motion for leave to docket it out of time will be overruled; and respondent having filed a perfect transcript, judgment will, on his motion, be affirmed. — Williams v. Kortsendorffer, 72.
4. *Practice, Supreme Court — Appeal — Affirmance of judgment.* — When appellant fails to prosecute his appeal in the manner required by law, and respondent presents a complete transcript to this court, on his motion judgment will be affirmed. — Koenig v. Rohlfing, 163.
5. *Practice, civil — Trial — Instruction — Transcript — Bill of exceptions.* — Although instructions may appear among the papers in a cause and be spread upon the transcript, they will be disregarded unless they form a part of the bill of exceptions. — Sturdivant v. Watkins, 177.
6. *Practice, civil — Appeal — Bill of exceptions — Certificate of judge.* — A certificate by a judge attached to a bill of exceptions, that the testimony in the cause was taken by plaintiff in writing at the time and appeared correct, but had been mislaid or lost, and directing the clerk to transcribe and send up the testimony if found, but containing no statement that the evidence actually sent up was the evidence and all the evidence given in the cause, is not such a certificate as the law requires. — *Id.*
7. *Practice, civil — Testimony — Supreme Court.* — In law cases this court will not weigh conflicting testimony. — Gradalph v. Fink, 291.
8. *Practice, civil — Supreme Court — Exceptions — Review.* — Where no exceptions are saved by appellant, this court will not review the cause. — Asbury v. Lenoir, 298.
9. *Practice, civil — Evidence, Supreme Court will not weigh.* — Under the present system of practice, when a lower court tries a case, sitting as a jury, the Supreme Court will not undertake to weigh evidence, and say whether it justifies the trial court or not, except in a strictly equitable action; and where no question of law is raised a case can not be reviewed. — Wielandy v. Lemuel, 322.
10. *Practice, civil — Supreme Court.* — Where plaintiff in error fails to file any statement or brief, as required by the statute (Wagn. Stat. 1068, § 80), the cause will be dismissed. — Thompson v. Thompson, 351.

See ADMINISTRATION, 11. HABEAS CORPUS, 1. PRACTICE, CRIMINAL, 10.

PUBLICATION.

1. *St. Louis Record — Judicial publication in, imparted notice.* — A paper devoted to the gathering up and dissemination of legal news may be a news-

PUBLICATION—(*Continued.*)
paper, and in that sense the *St. Louis Legal Record* was a newspaper, and publication in it imparted notice of a sale under deed of trust.—Kellogg v. Carrico, 157.

2. *Sales, judicial—Advertisement—Sunday non dies.*—Publication of notice of judicial sale from March 12th to April 15th, inclusive, satisfied the requirements of a deed calling for thirty days' notice of sale. The Sunday omissions did not vitiate the notice.—*Id.*

Q

QUO WARRANTO.
See OFFICERS, 1.

R

RAILROADS.

1. *Railroads, subscription by County Court for—Mandamus.*—In *mandamus* against the County Court of Nodaway county to compel the issue of certain county bonds in payment of shares of stock in the Missouri Valley Railroad Company: *held*, 1st, that the court might subscribe for the stock without submitting the matter to popular vote (Sess. Acts 1865, pp. 102-3, §§ 10, 11); 2d, that the fact that the road was not completed within the time called for by the contract—there being nothing to show that time was of the essence of the contract, and it appearing that the benefits sought to be derived from the road, and which were the inducements that led to the subscription, had accrued—would constitute no valid defense. If injury resulted from non-performance at the time, there might be an abatement in the shape of damages, but not an entire release from payment.—Kansas City, St. Jo. & Council Bluffs R.R. Co. v. Alderman, 849.

See DAMAGES, 2, 5, 6. EVIDENCE, 3. JURISDICTION, 1. PRACTICE, CIVIL—TRIALS, 5.

RECORD.
See CONVEYANCES, 5. EVIDENCE, 10.

REPLEVIN.

1. *Replevin—Wheat—Warehouse charges—Loss by fire—Set-off.*—In replevin for wheat, defendant justified the detention on the ground that he had a lien for warehouse charges. Plaintiff, *contra*, claimed that a part of the wheat had been destroyed through defendant's negligence to an amount equal to the storage charges. *Held*, that evidence touching the loss of the wheat was proper. The allowance of the damage therefor did not enlarge the scope of the petition permitting a recovery of wheat not sued for, but went simply to the extinguishment of defendant's lien.—Babb v. Talcott, 343.

See ATTACHMENT, 3.

RES ADJUDICATA.
See COURTS, COUNTY, 1.

RES GESTÆ.
See EVIDENCE.

REVENUE.

1. *Constitution, State, does not prohibit amendments or repeals by implication—Construction of statute.*—The act of March 18, 1870, touching the assess-

REVENUE—(*Continued.*)

ment and collection of revenue on real estate, by implication repeals such portions of the revenue act (Wagn. Stat. 128, particularly § 88, p. 1198) as are repugnant to and inconsistent with it. The State constitution (see art. IV, § 25) does not prohibit amendments by implication. It has not said that when an act is passed inconsistent with a preceding one, so that both can not stand, the latter one shall be void and the earlier one shall prevail; but has left the law as it always has been, viz: that when two statutes are inconsistent and repugnant, the one last enacted shall be considered in force. But in order to supplant previous ones, statutes must be clearly repugnant; for a legislative attempt to repeal will not be assumed if any other construction can be given to the subsequent act. The prior act will not be disregarded if it can stand with the other.

The method provided by section 66, chapter 12, Gen. Stat. 1865, of delivering the tax book to the county auditor, who is to make out the tax bills and furnish them to the collector, is repugnant to the act of March 18, 1870, and must be controlled by it.—State ex rel. Maguire v. Draper, 29.

2. *Revenue—Tax delinquents, penalty imposed on—School fund.*—The Legislature plainly intended, by section 4 of the act of March 18, 1870 (Sess. Acts 1870, p. 115), to divert the ten per cent. penalty imposed upon tax delinquents from the school fund and add it to the tax of each kind.—*Id.*

3. *Revenue, collection of—Act of March 18, 1870, constitutional.*—The act of March 18, 1870, touching the assessment and collection of revenue on real estate (Sess. Acts 1870, p. 114), is constitutional. (State *ex rel.* Maguire v. Draper, *ante*, p. 29, affirmed.)—State ex rel. McRee v. Maguire, 35.

4. *Revenue, county—Roads—General county tax—Construction of charter.*—Citizens of the city of Hannibal are not exempt from county taxes by virtue of section 7, article IX, of the charter of that city (Sess. Acts 1851, p. 337). The charter merely exempts them from taxes "for any county *road* purposes." The word "road" was evidently omitted inadvertently.—Jackson v. Meredith, 89.

5. *Revenue—Foreign insurance companies—Ordinance compelling payment of $200 invalid—Construction of statute.*—Agents of foreign insurance companies are not liable to payment of $200 for license, as called for by the city ordinance of St. Louis, approved June 29, 1869. Subdivision 45 of section 1, article IV, of the city charter, passed in 1867 (Sess. Acts 1867, p. 45), authorizing the license, by ordinance not inconsistent with the laws of the State, of "all insurance companies, banking corporations and banking associations," did not repeal section 6, p. 780, Wagner's Statutes, compelling agents of foreign insurance companies to pay an annual tax of $100 to the city collector, but left that section in full force. There was nothing irreconcilable between the general affirmative power as to licensing, contained in the city charter, and the especial clause embodied in the statute. Hence the ordinance of June 29, 1869, was unauthorized and void.—City of St. Louis v. The Independent Ins. Co. of Massachusetts, 146.

6. *Revenue, license with view to—Municipal corporation.*—A right to license an employment does not imply the right to charge a license fee therefor with a view to revenue, unless such seems to be the manifest purpose of the power. But the authority of the corporation will be limited to such a charge for the license as will cover the necessary expense of issuing it, and the additional

REVENUE—(*Continued.*)

labor of offices and expenses thereby imposed.—City of St. Louis v. Boatmen's Ins. and Trust Co., 150.

7. *Revenue—Corporations—Insurance companies—St. Louis, city of, can not impose tax for revenue.*—The power given to the city of St. Louis in its charter to license insurance companies (Sess. Acts 1867, p. 65, art. IV, subd. 45) does not authorize the imposition of a tax for revenue.—*Id.*

8. *Revenue—Taxation—Clause of charter withdrawing corporation from operation of general law does not do away with taxing power.*—A clause in the act incorporating the Boatmen's Insurance and Trust Company of St. Louis, which withdrew it from the operation of the general law of 1855 relating to corporations, simply guaranteed it against alteration and repeal, and in nowise granted it immunity from taxation.

When the charter is silent on the subject of taxation, unless there is some contract to be impaired where there is a consideration given, it will never be presumed that the Legislature divests itself of the power to tax. The surrender of such an important prerogative is not to be deduced by implication.—*Id.*

9. The City of St. Louis v. The Boatmen's Ins. and Trust Co., *ante*, p. 150, affirmed.—City of St. Louis v. Marine Ins. Co., 163.

10. *Act of March 13, 1867—Construction of statute—Revenue—Special tax bills—Execution—Transcript.*—The act of March 13, 1867 (Sess. Acts 1867, p. 79, art. XI), repealing that of March 19, 1866 (Sess. Acts 1865-6, p. 79), does not authorize the enforcement of the judgment of a justice of the peace upon a special tax bill, on filing of a transcript of the judgment, by the issue of an execution thereon by the circuit clerk.—Moran v. January, 166.

11. *Revenue—County collector, errors of, in listing property, will not avoid assessment.*—The county collector is an executive officer, and has always been protected by his precept, unless it appears on its face to have been issued against property wholly exempt from taxation. Mere errors or irregularities in the manner of listing property, in the name of the supposed owner, or in any other respect not to render the paper void, will not excuse the collector from the performance of his duty.—St. Louis Building and Savings Association v. Lightner, 893.

12. *Revenue—Taxation—U. S. bonds, shares of stock invested in, may be taxed.*—Although United States bonds as such can not be taxed, the shares of the capital stock of a corporation can be taxed at their true value, although a part or the whole of it may be invested in such bonds. Thus the bonds are in effect taxed as affecting the value of the shares of stock; and where the officers of the bank furnish the assessor with the names of the shareholders, together with the amount of stock held by each, their shares should be so assessed as to cover the value of their bonds, and it will be the duty of their officers to pay this tax on behalf of the shareholders.

And where the officers make no objection on the ground of the irregularity of the assessment, and are themselves a party to it, and the claims of the assessor are substantially correct, upon no principle should they be permitted to say that his error in assessing the shares to the bank instead of its stockholders rendered the assessment void and the collector a trespasser.—*Id.*

13. *Revenue—Corporations, stock of, what liable to assessment.*—Not only the original stock, but all after-acquired capital stock of a corporation in private

REVENUE—(*Continued.*)

hands, is liable to assessment under the revenue act of 1864 (Sess. Acts 1863–4, p. 65).—St. Louis Mutual Life Ins. Co. v. Charles, 462.

14. *Revenue, action of assessor in matter of, judicial — Collector liable to tax-payer for property irregularly assessed, when.*—The action of the assessor and that of the board of appeals or County Court, in the matter of taxation, are judicial; and if it appears from the tax list that the assessor has jurisdiction over the property—*i. e.*, that it is liable to taxation in any form, although irregularly assessed—he is not liable to the tax-payer for the amount collected.—*Id.*

15. *Revenue — Corporation — Capital stock — Shares of stock — Judgment against collector for taxes irregularly assessed, effect of.*—The statute makes a distinction between the liability to taxation of the property of a corporation embraced within its capital stock and of the shares of such stock, but the result is or should be the same. In either case, if the officers of the corporation pay the tax, they pay it for the shareholders; and if judgment is rendered against the collector for the amount of taxes collected by him from a corporation, the result of the judgment will be to collect of defendant, for the use of the shareholders, a sum of money in effect paid for them and which they were under obligation to pay.—*Id.*

16. *Revenue — Land commissioner, proceedings before for opening street — Assessments against adjoining property-owners — Property of can not be sold unless a bargain could not be made with owner of property sought to be taken — Injunction a proper remedy in such cases.*—To entitle the city of St. Louis to collect from adjoining property-owners the amount of assessments taxed against them for the opening of streets, under the city charter (Sess. Acts 1867, p. 72, § 2), it must appear that before instituting proceedings before the land commissioner for the condemnation of the property to be taken, an attempt was made with the owner thereof to effect an agreement as to the terms of purchase. The effort to make such agreement was an imperative obligation and constituted a condition precedent to the exercise of the right of eminent domain by the city. And the duty of proving the failure to agree devolved upon the city. The power to take private property for public use, without the consent of the owner, is in derogation of the rights of the citizen, and can only be justified on grounds of absolute necessity; and, when exercised, the power conferring the right must be strictly adhered to and complied with.

And where no such agreement is shown to have been made, the adjoining property-owner may restrain the city, by injunction, from selling his land to satisfy such assessment. Courts of equity never allow relief by injunction to prevent the sale of personal property; but where real property is about to be sold by a municipal corporation for the payment of taxes or assessments, equity will interpose. The distinction lies in the fact that in the one case a full and complete remedy is furnished at law, while in the other a cloud is about to be cast over a land title, and the court interferes to prevent it.—Leslie v. City of St. Louis, 474.

17. *Revenue — Land commissioner — Wharf opening — Attempt at bargain with property-owner — Jury — Change in jurors — Irregularity of proceedings.*—In proceedings before a land commissioner for the condemnation of property

REVENUE—(*Continued.*)

for wharf purposes in the city of St. Louis, it appeared that no attempt had been made by the city to effect an agreement with the owner for the purchase of the property before commencing proceedings; that before the verdict of the jury had been written out, one juryman died and another left the country; that thereupon the commissioner, seeing the impossibility of obtaining a verdict from the impaneled jury, summoned and impaneled two new jurors, who were sworn on different days; and that these two, with the original four, who were not re-sworn, constituted the second jury. No new notice was given to any of the parties whose property was sought to be taken, that the trial was to be had *de novo;* and this new jury made out and published their verdict. *Held*, that the proceeding was utterly void: 1st, because no attempt was made to effect an agreement with the property-owner prior to the proceedings; 2d, because of the irregularity and palpable violation of the law in the matter of the proceedings for condemnation. But *held*, that in such case injunction by the parties whose property was sought to be condemned would not lie, since they would have a complete, adequate and ample remedy at law, and there would therefore be no necessity for resorting to equity. The trespass in this case sought to be enjoined may be compensated in damages, and, if possession of property were taken, ejectment would lie to try the title and show the illegality of the proceedings. Moreover, where property is sought to be taken through the instrumentality of courts or officers of inferior local jurisdiction, as in the present case, a full and ample means would be afforded to review the proceedings and have their validity passed upon by a common-law writ of *certiorari*.—Anderson v. City of St. Louis, 479.

18. *Revenue—Taxes, assessment of by County Court—Certiorari will lie to review action of.*—The action of a County Court in assessing taxes upon property under the statute (Wagn. Stat. 1174, § 51) is clearly judicial, and hence the writ of *certiorari* will lie to review its action in this regard.—State, on petition of Taylor, Adm'r of Lee, v. St. Louis County Court, 594.

19. *Revenue—Bonds taxed according to the situs of the property, and not the domicile of its owner.*—Bonds of the "Masonic Hall Association" of St. Louis, in the hands of an administrator in St. Louis, are subject to taxation in this State, although the deceased owner of the bonds, at the time of his death, resided in Illinois, and the bonds had been once assessed in that State, and were only transferred to Missouri for the purpose of ancillary administration. The actual *situs* of personal property, and not the domicile of its owner, determines under the law of what State it shall be taxed. Section 24, page 115, Wagn. Stat., providing that real estate shall descend according to the laws of its *situs*, and personal property shall be distributed according to the laws of the domicile of the decedent, has no application to the case under consideration.

In no sense can it be said that the property represented by these bonds was in the possession of the foreign administrator; and it is immaterial that the bonds may have been transmitted from such foreign administrator for the purpose of ancillary administration.

Such bonds are not exempt from local taxation on the ground that the law makes no special provision for taxing such securities. Under our law, bonds are left to be taxed like other property where they can be reached, except that

REVENUE—(*Continued.*)

if the owner resides in the State they shall be taxed in the county of his residence. (Wagn. Stat. 116, § 9.)—*Id.*

ROADS, COUNTY

See REVENUE, 4.

S

ST. LOUIS, CITY OF.

1. *Revenue—Foreign insurance companies—Ordinance compelling payment of $200 invalid—Construction of statute.*—Agents of foreign insurance companies are not liable to the payment of $200 for license, as called for by the city ordinance of St. Louis, approved June 29, 1869. Subdivision 45 of section 1, art. IV, of the city charter, passed in 1867 (Sess. Acts 1867, p. 45), authorizing the license, by ordinance not inconsistent with the laws of the State, of "all insurance companies, banking corporations and banking associations," did not repeal section 6, p. 780, Wagner's Statutes, compelling agents of foreign insurance companies to pay an annual tax of $100 to the city collector, but left that section in full force. There was nothing irreconcilable between the general affirmative power as to licensing, contained in the city charter, and the especial clause embodied in the statute. Hence the ordinance of June 29, 1869, was unauthorized and void.—City of St. Louis v. The Independent Ins. Co. of Massachusetts, 146.

2. *Revenue—Corporations—Insurance companies—St. Louis, city of, can not impose tax for revenue.*—The power given to the city of St. Louis in its charter to license insurance companies (Sess. Acts 1867, art. IV, p. 65, subd. 45) does not authorize the imposition of a tax for revenue.—City of St. Louis v. The Boatmen's Ins. and Trust Co., 150.

3. *Revenue—Taxation—Clause of charter withdrawing corporation from operation of general law does not do away with taxing power.*—A clause in the act incorporating the Boatmen's Insurance and Trust Company of St. Louis, which withdrew it from the operation of the general law of 1855 relating to corporations, simply guaranteed it against alteration and repeal, and in nowise granted it immunity from taxation.

When the charter is silent on the subject of taxation, unless there is some contract to be impaired where there is a consideration given, it will never be presumed that the Legislature divests itself of the power to tax. The surrender of such an important prerogative is not to be deduced by implication.—*Id.*

4. *Revenue—Land commissioner, proceedings before for opening street—Assessments against adjoining property-owners—Property of can not be sold unless a bargain could not be made with owner of property sought to be taken—Injunction a proper remedy in such cases.*—To entitle the city of St. Louis to collect from adjoining property-owners the amount of assessments taxed against them for the opening of streets, under the city charter (Sess. Acts 1867, p. 72, § 2), it must appear that before instituting proceedings before the land commissioner for the condemnation of the property to be taken, an attempt was made with the owner thereof to effect an agreement as to the terms of purchase. The effort to make such agreement was an imperative obligation and constituted a condition precedent to the exercise of the right of eminent domain by the city. And the duty of proving the failure to

ST. LOUIS, CITY OF—(*Continued.*)

agree devolved upon the city. The power to take private property for public use, without the consent of the owner, is in derogation of the rights of the citizen, and can only be justified on grounds of absolute necessity; and, when exercised, the power conferring the right must be strictly adhered to and complied with.

And where no such agreement is shown to have been made, the adjoining property-owner may restrain the city, by injunction, from selling his land to satisfy such assessment. Courts of equity never allow relief by injunction to prevent the sale of personal property; but where real property is about to be sold by a municipal corporation for the payment of taxes or assessments, equity will interpose. The distinction lies in the fact that in the one case a full and complete remedy is furnished at law, while in the other a cloud is about to be cast over a land title, and the court interferes to prevent it.—Leslie v. The City of St. Louis, 474.

5. *Revenue—Land commissioner—Wharf opening—Attempt at bargain with property-owner—Jury—Change in jurors—Irregularity of proceedings.*—In proceedings before a land commissioner for the condemnation of property for wharf purposes in the city of St. Louis, it appeared that no attempt had been made by the city to effect an agreement with the owner for the purchase of the property before commencing proceedings; that before the verdict of the jury had been written out, one juryman died and another left the country; that thereupon the commissioner, seeing the impossibility of obtaining a verdict from the impaneled jury, summoned and impaneled two new jurors, who were sworn on different days; and that these two, with the original four, who were not re-sworn, constituted the second jury. No new notice was given to any of the parties whose property was sought to be taken, that the trial was to be had *de novo;* and this new jury made out and published their verdict. *Held*, that the proceeding was utterly void: 1st, because no attempt was made to effect an agreement with the property-owner prior to the proceedings; 2d, because of the irregularity and palpable violation of the law in the matter of the proceedings for condemnation. But *held*, that in such case injunction by the parties whose property was sought to be condemned would not lie, since they would have a complete, adequate and ample remedy at law, and there would therefore be no necessity for resorting to equity. The trespass in this case sought to be enjoined may be compensated in damages, and, if possession of property were taken, ejectment would lie to try the title and show the illegality of the proceedings. Moreover, where property is sought to be taken through the instrumentality of courts or officers of inferior local jurisdiction, as in the present case, a full and ample means would be afforded to review the proceedings and have their validity passed upon by a common-law writ of *certiorari*.—Anderson v. The City of St. Louis, 479.

6. *St. Louis, city of—Ordinance—Water-pipe, averment as to necessity of.*—The act to enable the city of St. Louis to procure a supply of wholesome water (Adj. Sess. Acts 1868, p. 291) declares, among other things, that "whenever the city council shall, by a vote of two-thirds of all the members elected, declare the laying of a water-pipe to be necessary, the board of water commissioners shall cause the same to be laid." An ordinance of the city council authorizing the laying of a certain water-pipe did not in direct terms declare the laying of the same to be necessary. *Held:*

ST. LOUIS, CITY OF—(*Continued.*)

1. That the ordinance was not for that reason invalid. The passage of the ordinance was equivalent to an averment that the necessity had arisen, and had been declared and acted upon.

2. A resolution of the council requesting the commissioners to suspend the laying of the water-pipe did not have the binding force of law, nor did it revoke the previous ordinance.

3. The passage of the ordinance constituted a justification for the proceedings of the commissioners in laying the pipe, although the ordinance failed to show that it was passed by a vote of two-thirds of all the members elected to the council. The commissioners had a right to assume that the ordinance was legally passed. If two-thirds of all the members elected did not vote for it, it was illegal and void, but to determine that matter the proceedings of the council itself should be brought up.—Young v. The City of St. Louis, 492.

ST. LOUIS LEGAL RECORD.

See PUBLICATION, 1.

SALES.

1. *Sales, judicial—Advertisement—Sunday non dies.*—Publication of notice of judicial sale from March 12th to April 15th, inclusive, satisfied the requirements of a deed calling for thirty days' notice of sale. The Sunday omissions did not vitiate the notice.—Kellogg v. Carrico, 157.

2. *Sale of land—Description.*—Although a deed of trust described the real estate conveyed as two separate parcels of land, yet where it appeared that the parcels constituted but one farm, and by the advice of the trustees and with the assent of the beneficiary they were sold together, such sale was proper.—*Id.*

3. *Sales, questions of fact touching, submitted to the jury.*—In the sale of personal property, where there is any conflict of testimony, questions as to whether the vendor intended by the bill of sale to vest immediate title in the vendee, and whether there was a delivery to and subsequent possession by the vendee, are issues which, under proper instructions, should be submitted to the jury.—Jones, Adm'r of Seals, v. Hook, Adm'r of Reed, 329.

4. *Sheriff's deed, recitals in.*—The recitals in a sheriff's deed are conclusive on the parties to the deed and those claiming under them.—Durette v. Briggs, 356.

5. *Executions—Sales under satisfied executions—Evidence, parol, touching.*—When it appears that certain of the premises levied on were sold by virtue of one or more executions after such executions were satisfied by the sale of other property, the deed as to such premises so subsequently sold is void and inoperative; and the question whether the premises were sold under executions which had thus performed their office was one to be decided either by the recitals of the sheriff's deed or by evidence *aliunde*.—*Id.*

6. *Sales—Vendor's lien waived by taking collateral security.*—It is the settled law of this State that where the vendor of land takes collateral security for the purchase money, he will be presumed to have waived his lien upon the land conveyed; and if he entertained a different intent, he must show it by satisfactory testimony.—*Id.*

See ADMINISTRATION, 9. CONVEYANCES, 3. EQUITY, 11. EVIDENCE, 4. EXECUTIONS, 2. INJUNCTION, 2. TRUSTS AND TRUSTEES, 3.

SCHOOLS.

1. *School, normal — State auditor — Allowance to members of board of regents for attendance at meeting.*—Under the act in aid of normal schools (Sess. Acts 1870, p. 134, §§ 3, 6, 8), members of the board of regents are entitled, for the first meeting of the board, to mileage from their places of residence to Jefferson City, from thence to the points in succession which they are called on officially to visit, and thence to their places of residence. And they are entitled to a per diem not to exceed six days, although they may lawfully do business for a longer period.—State ex rel. Milner v. Draper, 265.

SEAL.

See ATTACHMENT, 2.

SET-OFF.

See PRACTICE, CIVIL—PLEADING, 4. PRACTICE, CIVIL—TRIALS, 3. REPLEVIN, 1.

SHERIFFS' SALES.

See CONVEYANCES, 3, 6. INJUNCTION, 2. PARTITION, 1. SALES, 5.

SPECIFIC PERFORMANCE.

See CONTRACTS, 3.

STATUTE, CONSTRUCTION OF.

1. *Constitution, State, does not prohibit amendments or repeals by implication — Construction of statute.*—The act of March 18, 1870, touching the assessment and collection of revenue on real estate, by implication repeals such portions of the revenue act (Wagn. Stat. 128, particularly § 88, p. 1198) as are repugnant to and inconsistent with it. The State constitution (see art. IV, § 25) does not prohibit amendments by implication. It has not said that when an act is passed inconsistent with a preceding one, so that both can not stand, the latter one shall be void and the earlier one shall prevail; but has left the law as it always has been, viz: that when two statutes are inconsistent and repugnant, the one last enacted shall be considered in force. But in order to supplant previous ones, statutes must be clearly repugnant; for a legislative attempt to repeal will not be assumed if any other construction can be given to the subsequent act. The prior act will not be disregarded if it can stand with the other.

   The method provided by section 66, chapter 12, Gen. Stat. 1865, of delivering the tax book to the county auditor, who is to make out the tax bills and furnish them to the collector, is repugnant to the act of March 18, 1870, and must be controlled by it.—State ex rel. Maguire v. Draper, 29.

2. *Repeals by implication not favored.*—The law does not favor repeals of statutes by implication. A later statute, which is general and affirmative, does not abrogate a former one which is particular, unless negative words are used, or unless the two acts are irreconcilably inconsistent.—City of St. Louis v. The Independent Ins. Co., 146.

3. *Elections — County treasurer, appointed in January, 1871, entitled to office as against one elected in November.*—A. was elected county treasurer of St. Louis county in November, 1870. B. was appointed treasurer in January, 1871. In *quo warranto* to test the title of A. to the office, *held*, that the election in November was illegal and void; that notwithstanding that election, the office was vacant on January 5, 1871, and that B. was properly appointed to fill the vacancy.

STATUTE, CONSTRUCTION OF—(*Continued.*)

The clause of the act of March 3, 1857, fixing on the first Monday of August, 1858, and every six years thereafter, as the time for the election, was, in its designation of the day of the week for the election, in conflict with section 2, article II, of the present State constitution, and was therefore, so far forth, repealed; but the constitution did not affect the six years provided for the treasurer's term of office. And the Legislature was authorized to alter the law as to the day of the week, and fix on the Tuesday following the first Monday in August as that for the election. (Sess. Acts 1865–6, p. 88.) Hence the day for election was properly in August, and not in November.—State ex rel. Attorney-General v. Fiala, 310.

4. *Elections — County treasurer — Act of March 19, 1866, a general and not special law relative to the time of holding county, town and city elections.*—The act of March 19, 1866 (Sess. Acts 1865–6, p. 88), is not void as being in conflict with that part of section 27, article IV, of the State constitution which prohibits special legislation. Nor was it unconstitutional as reviving a special law. The act of March 3, 1857, was never revived by it.—*Id.*

5. *County treasurer — Elections — Act of March, 1857, not repealed by section 1, chapter 38, Gen. Stat. 1865, or by act of March 22, 1870.*—The act of March 3, 1857, was not repealed either by section 1, chapter 38, Gen. Stat. 1865, or the act of March 22, 1870 (Sess. Acts 1870, § 35). Neither of the last-named enactments had any reference to the local act of 1857. The object of that of March 22, 1870, was to amend the general law in relation to county treasurers (Gen. Stat. 1865, ch. 38, § 1). But, even supposing that the act of March, 1870, had been enacted as a new law throughout, and that its provisions were in conflict with the prior local act, it did not have the effect of repealing it by implication, as nothing indicates an intention on the part of the Legislature to do away with the local act. Section 2 of the act of March, 1870, in terms repealing all acts and parts of acts in conflict with it, refers only to general, inconsistent laws. It was no part of the purpose of the act to touch the question of elections or the term of office.—*Id.*

6. *Insurance, foreign — Agent — Proceedings against — Information — Court of Criminal Correction.*—One acting as agent and receiving premiums in St. Louis county, on behalf of a foreign insurance company which was not authorized by the superintendent of the insurance department to do business in this State, contrary to section 42 of the act concerning insurance other than life (Wagn. Stat. 777), may be proceeded against under section 30, p. 516, Wagner's Statutes. Notwithstanding that the statute which creates the offense provides for a different remedy (Wagn. Stat. 777, § 43), there is no inconsistency between the two statutes. But the proceeding in such case must be by information in the Court of Criminal Correction, and not by indictment.

As to all the rest of the State besides St. Louis county, the misdemeanor act of March 27, 1868 (Sess. Acts 1868, p. 81), repealed by implication section 30 *supra*, and it was not restored by the repealing act of February 24, 1869 (Sess. Acts 1869, p. 69). (See State v. Huffschmidt, *ante*, p. 73.)—State v. Stewart, 382.

ADMINISTRATION, 4 (Sess. Acts 1845, p. 70), 6 (Sess. Acts 1866, p. 85, § 6), 7 (Wagn. Stat. 102, § 2), 9 (Wagn. Stat. 98, § 33).

ARBITRATION AND AWARD, 1, 3 (Wagn. Stat. 143, §§ 3, 6).

STATUTE, CONSTRUCTION OF—(*Continued.*)
ATTACHMENT, 1 (Gen. Stat. 1865, p. 569, § 60; Wagn. Stat. 193, § 60.)
BANKRUPTCY, 1 (U. S. Stat. at Large, 1867, p. 533).
CONTRACTS, 5 (Wagn. Stat. 137, § 17), 8 (R. C. 1855, p. 1502, § 24; Sess. Acts 1859–60, p. 91; Sess. Acts 1838–9, p. 176).
CRIMES AND PUNISHMENTS, 1 (Wagn. Stat. 504, § 35; *id.* 516, § 24; *id.* 894, § 3; Sess. Acts 1868, p. 81; Gen. Stat. 1865, ch. 207, § 30; Sess. Acts 1869, p. 69, § 30), 3 (Wagn. Stat. 470, § 16).
CRIMINAL LAW, 2 (Wagn. Stat. 488, § 19).
DOWER, 1 (Wagn. Stat. 544, § 29).
EXECUTIONS, 2 (Sess. Acts 1863, p. 20, § 1).
HUSBAND AND WIFE, 1 (Gen. Stat. 1865, ch. 68, § 14; Wagn. Stat. 331–2, § 14; *id.* 935–6, § 14).
INJUNCTION, 3 (Wagn. Stat. 1030, § 13).
INSURANCE, FIRE AND MARINE, 1 (Gen. Stat. 1865, ch. 90, § 1)
INSURANCE, LIFE, 3, 4, 5 (Wagn. Stat. 936, §§ 15, 18).
JUDGMENT, 1 (Sess. Acts 1869, p. 18, § 2).
JURISDICTION, 1 (Wagn. Stat. 292, § 19).
JUSTICES' COURTS, 1 (Wagn. Stat. 850, § 23).
LANDS AND LAND TITLES, 11 (Wagn. Stat. 1312, § 31; *id.* 1310, § 24), 13 (Wagn. Stat. 1022, § 53).
LIMITATIONS, 2 (Sess. Acts 1847, pp. 94–5, §§ 1, 4; R. C. 1855, p. 1053, § 15), 3 (Wagn. Stat. 291, § 13; *id.* 336, § 13).
MECHANICS' LIEN, 1 (Gen. Stat. 1865, p. 768, § 19; Wagn. Stat. 911, § 19; *id.* 909, § 6).
MORTGAGES AND DEEDS OF TRUST, 7 (Gen. Stat. 1865, ch. 160, §§ 28–9), 8 (Wagn. Stat. 281, § 10).
PARTNERSHIP, 2 (Wagn. Stat. 269, § 1)
PRACTICE, CIVIL — PARTIES, 1 (Wagn. Stat. 1005).
PRACTICE, CIVIL — PLEADING, 1 (R. C. 1855, p. 252, § 47), 6 (Wagn. Stat. 1015, § 12), 13 (Wagn. Stat. 1045, § 40).
PRACTICE, CIVIL — TRIALS, 3 (Wagn. Stat. 1021, § 47), 5 (Wagn. Stat. 519–20, §§ 2, 3).
PRACTICE, CRIMINAL, 6 (Wagn. Stat. 1107, § 1), 7 (Wagn. Stat. 1090, § 24), 8 (Wagn. Stat. 476, § 4), 11 (Wagn. Stat. 1091, § 31).
RAILROADS, 1 (Sess. Acts 1865, pp. 102–3, §§ 10, 11).
REVENUE, 1, 2 (Wagn. Stat. 1198, § 88; Gen. Stat. 1865, ch. 12, § 66; Sess. Acts 1870, p. 115, § 4), 3 (Sess. Acts 1870, p. 114), 4 (Sess. Acts 1851, p. 337), 5, 7 (Wagn. Stat. 780, § 6; Sess. Acts 1867, p. 45, § 1, subd. 45), 10 (Sess. Acts 1867, p. 79, art. XI; Sess. Acts 1865–6, p. 79), 16 (Sess. Acts 1867, p. 72, § 2), 18 (Wagn. Stat. 1114, § 51), 19 (Wagn. Stat. 115, § 24; *id.* 116, § 9).
ST. LOUIS, CITY OF, 6 (Adj. Sess. Acts 1868, p. 291).
SCHOOLS, 1 (Sess. Acts 1870, p. 134, §§ 8, 6, 8).
WILLS, 8 (R. C. 1855, p. 795).
WITNESSES, 1, 2 (Wagn. Stat. 1371, § 1).

STOCKHOLDER.
See LIMITATIONS, 3. PRACTICE, CIVIL — PLEADING, 11.

SUNDAY.
See CRIMES AND PUNISHMENTS, 1. PRACTICE, CRIMINAL, 1. PUBLICATION, 2.

SUPREME COURT.
See PRACTICE, SUPREME COURT.
STREET-OPENING.
See ST. LOUIS, CITY OF, 4, 5.
SURETIES.
See ADMINISTRATION, 4, 5. EVIDENCE, 9.
SWAMP LAND.
See LANDS AND LAND TITLES, 6.

T

TRANSCRIPTS.
See EXECUTIONS, 1. PRACTICE, SUPREME COURT, 5, 6.
TREASURER, COUNTY.
See ELECTIONS, 1, 2, 3.

TRESPASS.

1. *Trespass — Action for, by plaintiff claiming merely by possession, must show a seizure and carrying away.* — In trespass for carrying away from the possession of plaintiff a certain horse, where the evidence showed that plaintiff was not the rightful owner of the animal, but that his claim rested on mere possession, and that the horse voluntarily strayed from him and came into the possession of defendant; that there was no actual taking or seizing or removing from plaintiff's control: *held*, that plaintiff was not entitled to recover. — Pope v. Cordell, 251.

See DAMAGES, 1.

TRUSTS AND TRUSTEES.

1. *Agency — Co-owners of boat — Private bargain for transportation of freight — Trust.* — One who was a part owner and general active and managing agent of a steamboat, made a contract in his own name for the transportation of certain freight at a specified price. The contract was not made with reference to its being performed by the steamer mentioned, which was not at that time in port; but the contractor made use of the boat for the transportation of the freight, without mentioning to his co-owners his private arrangement as to price of freightage. *Held*, that he occupied a relation of trust toward the co-owners, and that they had a right to presume that he would exercise the most entire good faith in his dealings toward them, and that in any business in which he employed the boat they were entitled to a proportionate share of the profits received and earned. — Rea v. Copelin, 76.
2. *Agency — Trustee not allowed to profit out of his trust — Application of rule.* — The rule that a trustee is not allowed to make a profit out of his trust is based on a principle of human nature that no person having a duty to perform shall be allowed to place himself in a situation in which his interest and his duty may conflict; and by a trustee, in this sense, is meant a person who acts representatively, or whose office is to advise and operate not for himself, but for others. This principle applies to and includes executors, administrators, guardians, attorneys at law, general and special agents, assignees, commissioners, sheriffs, and all persons, judicial or private, ministerial or counseling, who in any respect have a concern in the business intrusted to them. — *Id.*

TRUSTS AND TRUSTEES—(*Continued.*)

3. *Trusts and trustees — Sale of land under deed of trust — Re-sale — Advertisement — Postponement.*—Where a purchaser at a trustee's sale refuses to complete the contract, it would be improper for the trustee to re-sell on the same day. His obvious duty would be to re-advertise and sell upon full notice, when the bidding would be open to competition, and a fair price might be obtained.

But a sale of this character must be distinguished from a regularly adjourned sale. The trustee may regularly adjourn a sale to a different time and place when in his discretion, fairly exercised, it shall seem to him necessary in order to obtain a fair auction price for the property. He should always postpone the sale when necessary to obtain a fair price, and should never permit the creditor to force the sale at an inadequate price.—Judge v. Boooge, 544.

See MORTGAGES AND DEEDS OF TRUST. WILLS, 5.

U

UNIVERSITY OF THE STATE OF MISSOURI.

See CONTRACTS, 8.

USAGE.

See CONTRACTS, 10.

V

VENDOR'S LIEN.

See LIEN, VENDOR'S.

VENUE.

See PRACTICE, CIVIL—TRIALS, 6, 7.

VERDICT.

See EQUITY, 13. PRACTICE, CIVIL—TRIALS 4, 5. PRACTICE, CRIMINAL, 4, 5, 6.

W

WHARF.

See ST. LOUIS, CITY OF, 5.

WILLS.

1. *Equity — Election, general principle of.*—The general principle of election is frequently applied by courts of equity in cases of wills, and rests upon the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is a clear intention of the person from whom he derives one, that he should not enjoy both.—Graham v. Roseburgh, 111.

2. *Equity—Specific performance—Election.*—A testator made a devise of "the residue" of his estate, in trust for the use and benefit of his heirs, among whom was A. Afterward the testator agreed to convey to A. a certain tract in Shelby county, which tract A. proceeded to possess and improve. On testator's death, the trustees paid over to A. his portion of the uses and profits derived from the "residue." In suit against the trustees for specific performance of testator's contract to convey, *held*, that A. would not be compelled

WILLS—(*Continued.*)

to elect between the rents and profits of his share in the residue and the land in controversy. The disposal of the Shelby land during the lifetime of the testator took it out of the residuary clause, and showed that he had no intention to include that property in the devise.—*Id.*

3. *Wills.*—A testator by will gave all his property to his wife, to manage and control for her benefit and that of their children, with power of sale, etc., and, at her death, to be divided among his children. On her death the administrator of testator took possession of her personal property, embracing household furniture, notes and accounts, claiming that they belonged to the estate, to be distributed according to the will. The administrator of the estate of the wife demanded the property, and proceeded against testator's administrator by attachment, under the statute (Wagn. Stat. 85, §§ 7-11). It appeared in evidence that, for many years after the death of her husband, the wife continued the business, and died in possession of an estate, treating it as her own, worth more than double that which was left her. *Held:* 1. That the property in charge of the wife, although a trust estate, as it terminated at her death, did not go to the administrator of the trustee, but went at once to the heirs of the testator. 2. That the household furniture was hers, whether she accepted or renounced the trust, and that the will should be held to apply only to the property subject to distribution. 3. That though the proper increase of the trust property was affected by the trust, yet the will being partly for her benefit, she was entitled to her proportionate share in the profits. 4. That, as the property belonging to the wife was so mixed with the other as not to be easily separated, the proceedings under the statute for concealing and embezzling property were not the proper ones for investigating the subject.—Hook, Adm'r of Dyer, v. Dyer, 214.

4. *Wills—Devise.*—The devise of an estate, with the power of disposal, will pass the fee.—Hazel v. Hagan, 277.

5. *Wills—Widow executrix, sale by after expiration of office—Personal trust.*—A testator willed to his wife all his property during her life. He also willed that the land might be sold at any time for her comfort and benefit. The will, moreover, designated the widow as one of the executors. *Held*, that the power of sale was a mere personal trust, not to be executed by the widow in virtue of her office as executrix, but at any time that she might deem it advisable to carry out the design of the testator.—*Id.*

6. *Will, conveyance under, sufficiently executes power, when.*—A conveyance made pursuant to a will, containing a direct reference to the power embraced in the will, and in a manner so direct as to leave no room for doubt as to the intention of the grantor, sufficiently executes the power contained therein.—*Id.*

7. *Wills—Executor can not act without qualifying, except when.*—Under the law of this State the executor, by virtue of being so named, has no power to intermeddle with the estate of the testator except under pressing necessity, and only so far as is necessary, until letters have been obtained; although if he shall so intermeddle, and shall subsequently qualify, his letters will relate back and cover his former acts.—Stagg v. Green, 500.

8. *Wills—Act of 1825, child not mentioned, can not take child's share unless forgotten.*—Under the act of 1825 touching wills (R. C. 1825, p. 795), a child not mentioned in a will is not entitled to a child's share in the inheritance,

WILLS—(*Continued.*)

under the general law of descents and distributions, unless it is manifest from the will that the child was forgotten, and so unintentionally omitted.—McCourtney v. McCourtney, 583.

9. *Wills — Legacies — Survivorship — Death of legatee before that of testator — Lapse.* — A testamentary disposition will lapse by the death of the legatee during the life of the testator. But if a legacy be given to certain persons by name, and in the event of the death of either of them to the survivor, the alternative gift will take effect if the first legatee or devisee die even in the testator's lifetime.—Martin v. Lachasse, 591.

WITNESSES.

1. *Witnesses, statute concerning relates to parties to suit and issues on trial.*—The proviso of the statute concerning witnesses (Wagn. Stat. 1372, § 1) relates wholly to persons who are parties to the suit, the issue arising in which is on trial, and not to others who were merely parties to the original contract. The object and purpose of the statute was undoubtedly to put the two parties to a suit upon terms of substantial equality in regard to the opportunity of giving testimony.—Looker v. Davis, 140.

2. *Witnesses — Where one party is dead, statute concerning applies only where witness is party to a contract and the suit.* — The purchaser of land at sale under deed of trust sued the possessor in ejectment. The latter brought his cross-action by injunction to restrain the purchaser from further steps in his ejectment. The bill, among other things, set up an agreement between the maker and the beneficiary in the trust deed whereby the latter agreed to cancel the same, provided the maker would convey the land to the plaintiff in the injunction suit; and the bill averred that the land had been so conveyed to him. Although the beneficiary in the deed was dead at the time of bringing the suit, *held*, that under section 1, page 1372, Wagn. Stat., plaintiff was a competent witness as to the contract set up, not having been a party thereto. The rule excluding testimony under that statute applies only where the witness is party to the suit and also to the contract.—*Id.*

See EVIDENCE, 12.